No. 71-

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES, ET AL., PETITIONERS

v.

ROBERT W. PARKER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
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The Solicitor General, on behalf of the United States and the federal petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinions of the district court (Pet. App. C, *infra*), is reported at 309 F. Supp. 593. The opinion of the court of appeals (Pet. App. A, *infra*) is reported at 448 F. 2d 793.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on October 1, 1971. On December 23, 1971, Mr. Justice White extended the time within which to file a petititon for a writ of certiorari to

January 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 3(b) of the Wilderness Act of 1964 precludes the Secretary of Agriculture from managing lands having wilderness value contiguous to existing "primitive" areas according to the standards established and duties imposed by the Multiple-Use Sustained-Yield Act of 1960.

STATUTES INVOLVED

Sections 3(a) and (b) and 4(a)(1) of the Wilderness Act of September 3, 1964, 78 Stat. 890, 16 U.S.C. 1132(a) and (b), and 1133(a)(1), provide:

> NATIONAL WILDERNESS PRESERVATION SYSTEM—EXTENT OF SYSTEM
>
> SEC. 3. (a) All areas within the national forests classified at least 30 days before the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness", "wild", or "canoe" are hereby designated as wilderness areas. The Secretary of Agriculture shall—
>
> (1) Within one year after the effective date of this Act, file a map and legal description of each wilderness area with the Interior and Insular Affairs Committees of the United States Senate and the House of Representatives, and such descriptions shall have the same force and effect as if included in this Act: *Provided, however,* That correction of clerical and typographical errors in such legal descriptions and maps may be made.
>
> (2) Maintain, available to the public, records pertaining to said wilderness areas, including

maps and legal descriptions, copies of regulations governing them, copies of public notices of, and reports submitted to Congress regarding pending additions, eliminations, or modifications. Maps, legal descriptions, and regulations pertaining to wilderness areas within their respective jurisdictions also shall be available to the public in the offices of regional foresters, national forest supervisors, and forest rangers.

(b) The Secretary of Agriculture shall within ten years after the enactment of this Act, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. Such advice shall be given with respect to not less than one-third of all the areas now classified as "primitive" within three years after the enactment of this Act, not less than two-thirds within seven years after the enactment of this Act, and the remaining areas within ten years after the enactment of this Act. Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress. Areas classified as "primitive" on the effective date of this Act shall continue to be administered under the rules and regulations affecting such areas on the effective date of this Act until Congress has

determined otherwise. Any such area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. Notwithstanding any other provisions of this Act, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.

USE OF WILDERNESS AREAS

SEC. 4. (a) The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and—

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which

> national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

Section 2 of the Multiple Use-Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 529, provides:

> The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title

STATEMENT

On April 15, 1969, following a ten-year study which concluded that the area was more suitable for timber harvesting than wilderness use, the Forest Service entered into a contract with Kaibab Industries for the sale of 4.3 million board feet of timber in the East Meadow Creek Region of White River National Forest in Colorado, an area contiguous to the 61,000-acre Gore Range-Eagles Nest Primitive Area (C.A. App. 245, 246; [1] Pet. App. 15a–17a). The town of Vail, Colorado, a number of its residents and property owners, and three conservation groups brought the present suit to enjoin the Secretary of Agriculture and the Forest Service from consummating the contract.

[1] "C.A. App." refers to the appendix in the court of appeals.

At trial,[2] the forestry official in charge of wilderness studies for the area, Mr. Weidenhoff, testified that in his opinion East Meadow Creek did not qualify for inclusion in the wilderness system (C.A., App. 402). The Regional Forester, Mr. Nordwall, testified that in 1968, after reviewing recommendations submitted by his staff, he decided not to recommend that East Meadow Creek be designated as part of the wilderness system, because he concluded that it was more suitable for timber harvesting (C.A. App. 257–258). The formal report of the Secretary of Agriculture on the Gore Range-Eagles Nest Primitive Area under the Wilderness Act, dated November 2, 1971, adopted the recommendations of the staff in concluding that East Meadow Creek was more suitable for multiple-use purposes.

The Forest Service's conclusion that the area was more suitable for timber harvesting rested upon the following factors: The existence of a presently overgrown access road, running into the center of the region, which had been built as part of a program to combat beetle infestation; the area's proximity (less than two miles) to two previous timber sales; the

[2] The government originally moved for summary judgment on the ground that decisions relating to timber sales outside of existing primitive areas are matters Congress has committed to agency discretion under the Multiple-Use Act and, consequently, are not judicially reviewable. While the district court agreed that timber sales fall within the discretion of the Forest Service, the court denied the motion on the ground that the question whether this area was so "clearly wilderness" as to require Secretarial study should be determined after a trial. 307 F. Supp. 685, 688.

existence in the area of 14 mining claims; plans of the Denver Water Board possibly to locate a water diversion project there; and the fact that the area is surrounded on three sides by six privately owned parcels (Pet. App. 18a). These factors, the Forest Service determined, not only disqualified the area under the Wilderness Act's "untrammeled by man" standard, but made East Meadow Creek more suitable for timber harvesting than for wilderness use.

After trial, the court ruled that East Meadow Creek "seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value." 309 F. Supp. at 601; Pet. App. 29a. Relying on Section 3(b) of the Wilderness Act which provides in part,

> Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress * * * the addition of any contiguous area of national forest lands predominantly of wilderness value. * * *

the court held that the Forest Service must study the area and include it in its wilderness report, and enjoined the Forest Service from any acts, such as timber sales, which would irrevocably change the region's character until the President and Congress have made the ultimate decision on whether to include it in the wilderness system.

The court of appeals affirmed, holding (448 F. 2d at 797; Pet. App. 9a):

> The trial court, *having determined as a fact that the East Meadow Creek Area had predominantly wilderness value* which should be pre-

served for consideration at the executive and congressional level, was completely justified in directing inclusion of a study of the area in the mandated report to the President. This requirement in no way directs or limits the Secretary in his full discretionary right to make such recommendation to the President as he may deem proper. [Emphasis added.][3]

REASONS FOR GRANTING THE WRIT

Contrary to the expectations of Congress, the courts below turned the permissive language of Section 3(b) of the Wilderness Act into a mandate that no lands with wilderness qualities contiguous to "primitive" areas be used for other purposes until the President and Congress have passed on their wilderness value. Under this interpretation of the Act, the Secretary of Agriculture would be prevented from discharging his duties under the Multiple Use-Sustained Yield Act of 1960 to manage an estimated 4.75 million acres (nation-wide) of forest land, despite the express language of Section 4(a) of the Wilderness Act that "Nothing in this Act shall be deemed to be in interference with" the earlier law.[4] The case therefore warrants review by this Court.

[3] As noted, *supra*, p. 7, the district court found only that this area "seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value."

[4] While under Section 3(b) of the Wilderness Act the Secretary is to report his findings to the President within ten years of the Act's enactment in 1964, the impact of the decision below will not terminate in 1974. The Secretary is enjoined until both the President and Congress act. There are presently pending before Congress the Secretary's recommendations with respect

I. a. The Wilderness Act of 1964 established a new statutory classification of wilderness lands which are to be permanently retained in their natural state. Fifty-four previously protected areas, comprising more than nine million acres, became part of the wilderness system on the effective date of the Act. The remaining 34 areas previously designated as primitive, consisting of 5,477,740 acres, were left for further study. Congress directed the Secretary of Agriculture to study these 34 primitive areas and within ten years make his recommendations with respect to their inclusion in the wilderness system to the President and Congress. 1964 U.S. Code Cong. & Admin. Serv. 3626.

The reason for requiring further study—instead of immediately including those primitive areas in the wilderness system—was the realization that the Forest Service had overdrawn some of the previously protected areas in order to ensure the inclusion of all land which might upon further study be found to qualify as having primitive conditions. 107 Cong. Rec. 18364. The review was undertaken "so that any portion having merchantable timber or being more susceptible to multiple use would be excluded, and the remainder not susceptible to merchantable use, would be retained" (remarks of Senator Church, 107 Cong. Rec. 18374).

The legislative history of the Act shows that the intention of Congress was not to add new lands to

to seven primitive areas, one submitted in 1967, four in 1968, one in 1969 and one (Gore Range-Eagles Nest Primitive Area) in 1971.

those already removed from multiple use management, but rather that the Act's impact was to be solely upon lands already as removed. Thus, in the report of the Senate Committee on Interior and Insular Affairs to accompany S. 4, which became the Wilderness Act (Sen. Rept. No. 109, 88th Cong., 1st Sess.), the Committee states (p. 2):

> As reported [in connection with a previous wilderness bill passed by the Senate in 1961] * * *, the Wilderness Preservation System can be established without affecting the economic arrangements of communities, counties, States or business enterprises *since the areas are already withdrawn*, or because existing private rights and established uses are permitted to continue. *There will be* no withdrawal of lands from the tax base of counties or communities; *no withdrawal of timberlands* on which lumbering operations depend, nor any withdrawal of present grazing or mining rights. [Emphasis added.]

The Senate Report adds (p. 4):

> A second development since the previous report was filed is increased understanding and agreement that S. 4 does not "sterilize," "quarantine," nor "lock up" a vast new 60-million acre area of Federal lands, but involves *lands previously restricted in use* by laws creating our national parks, by establishment as wildlife areas, or *by national forest classification.* [Emphasis added.]

Congressman Saylor, who played a leading role in the House management of the bills which became the

Wilderness Act, stated with respect to the study which the Act directed to be undertaken:

> [T]his review relates only to the lands that Congress by the Act says are to be considered, and *all these lands are now in some kind of administrative status as wilderness.* [109 Cong. Rec. 11929 11930; see also 107 Cong. Rec. 18370; emphasis added.]

Likewise in the Senate, Senator Kuchel, made it clear that the Act and the study it directed would affect only lands already withdrawn from multiple use:

> I want to recall something which the able chairman of the Senate Committee on Interior and Insular Affairs, Senator Anderson of New Mexico, said when he spoke in the Senate last month. Senator Anderson said in part * * *:
>
> "There is a very sound reason for drawing a line between handling of areas already reserved and any new areas.
>
> "Inclusion of the wild, wilderness, primitive, park, and wildlife areas in the wilderness preservation system will cause little or no disturbance of individuals, communities, or economic patterns. *The areas have been withdrawn for years. There have been no timber sales from forest lands involved* so there are no lumber mills dependent on them which will have to close down. Established mining operations and grazing will not be disturbed.
>
> "There is thus virtually no change in the status quo of the areas to be handled under the

> presidential recommendations procedure in the bill. The bill simply makes wilderness preservation a statutory directive and responsibility of the existing land administering agency in its handling of already reserved lands."
>
> Mr. President, that explanation by the committee chairman is important. It is important for the Senate to understand that the lands under the jurisdiction of the Department of Agriculture and I speak of it particularly that will be affected by this bill are *those lands which, in his executive discretion, the Secretary of Agriculture has already determined shall be set aside as wilderness, wild, primitive, or canoe areas.* [Emphasis added; 107 Cong. Rec. 18370; see also 107 Cong. Rec. 18371, 18366 18367.]

Senator Church explained that the purpose of the ten-year review was "to separate out from these primitive areas any portion found to be more suitable for multiple use" (107 Cong. Rec. 18366; see also 107 Cong. Rec. 18046).

To the same effect are the remarks of Senator Morse (107 Cong. Rec. 18353); Senator Hart (107 Cong. Rec. 18391); Senator Kuchel (107 Cong. Rec. 18370); and Senator Murray (106 Cong. Rec. 15471).

Senator Humphrey introduced the original wilderness bill (S. 4013) in 1956, 84th Cong., 2d Sess., and along with other Senators reintroduced it as S. 1123 in 1959, 86th Cong., 1st Sess. Senator Humphrey stated that the latter bill would not injure commercial interests and that, for example, the bill "does not give wilderness status to a single acre of forest land now available for timber production" (105 Cong. Rec. 2637). In supporting these bills, the Wilderness Society, too, sought to

b. Ever since the enactment of the Organic Administration Act of 1897, 30 Stat. 35, Congress has authorized the Secretary of Agriculture "to regulate [the] occupancy and use" of national forests. 16 U.S.C. 551. And Congress has expressly specified the purposes for which national forests will be created—to "improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber * * *." 16 U.S.C. 475. The Secretary has specific authority, in his discretion, to sell national forest timber. 16 U.S.C. 476. The Multiple-Use Sustained-Yield Act of 1960 directs him to balance the potential uses of national forest lands—"outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (16 U.S.C. 528)—in a manner "that will best meet the needs of the American people." 16 U.S.C. 531(a).

In keeping with the legislative history previously discussed, Section 4(a) of the Wilderness Act (16 U.S.C. 113(a)(1)) reflects the congressional intention neither to nullify nor to supersede the provisions of the Multiple-Use Act by declaring:

> The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units

allay misgivings of commercial users of the forests. Mr. Howard Zahniser, its Executive Director, stated: "No lands affected by it [the Wilderness Bill] are now available for timber cutting" (104 Cong. Rec. 6778). See also 103 Cong. Rec. 1065; 104 Cong. Rec. 7970.

of the national park and national wildlife refuge systems are established and administered and—

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

The decision below, we submit, stands this congressional intent on its head. Instead of permitting the release of lands suitable for multiple use, including timber harvesting, it withdraws additional lands theretofore available for such multiple use.[6]

2. General application of the holding below would seriously disrupt the management for multiple use of millions of acres of forest lands committed to the discretionary management of the Department of Agriculture by the Multiple-Use Sustained-Yield Act of

[6] The court's reliance (Pet. App. 8a-9a) on a provision in the Forest Service Manual, FSM 2321(1), which directs the study of "contiguous lands which seem to have significant wilderness resources," as creating a duty to further study the affected area, is misplaced. The FSM provision is, not, as claimed, a regulation, but only an in-house directive. Moreover, it must be read in context with other provisions which direct attention to other considerations, *i.e.*, availability (FSM 2321.12) and need (FSM 2321.13). The complete directive, therefore, calls for comparative analysis of wilderness assets and liabilities, together with weighing multiple-use considerations—precisely the kind of study undertaken before it was decided to sell timber in the East Meadow Creek area (*supra*, p. 6).

1960. The decision would require the Forest Service to make no use of any forest lands having wilderness value contiguous to established primitive areas (an amorphous concept at best that would be exceedingly difficult to apply) until the President and Congress have acted with respect to those areas. The Department of Agriculture has estimated that of the 27 primitive areas upon which Congress has not acted, 24 have contiguous national forest lands of wilderness value, covering an estimated 4.75 million acres. General appplication of the holding below would prohibit the Forest Service from using any of these lands for parklands, camping areas, and wildlife and fish purposes as well as timber harvesting. Timberlands cover more than half of the 4.75 million acres of such contiguous land. The estimated timber stand on such contiguous areas is 26 billion board feet. Based upon current cutting allowances derived from prudent timber management practices, this would support an annual cut of approximately 351 million board feet. While that figure constitutes only 3 percent of the nationwide cutting allowance for the national forest system, the impact upon some states and localities of barring timber sales from these lands would be much greater. For instance, the allowable cut in Trinity National Forest could be reduced an estimated 25 percent. Some communities, dependent upon lumber, would be likely to be essentially deprived of Forest Service timber sales.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

[Filed, United States Court of Appeals, Tenth Circuit, Oct. 1, 1971, Howard K. Phillips, Clerk]

United States Court of Appeals, Tenth Circuit

September Term, 1971

Nos. 404–70, 405–70, 406–70

ROBERT W. PARKER, ET AL., APPELLEES

v.

UNITED STATES OF AMERICA; CLIFFORD HARDIN, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES; EDWARD P. CLIFF, INDIVIDUALLY AND AS CHIEF, UNITED STATES FOREST SERVICE; DAVID S. NORDWALL, INDIVIDUALLY AND AS REGIONAL FORESTER; JAMES O. FOLKESTAD, INDIVIDUALLY AND AS SUPERVISOR, WHITE RIVER NATIONAL FOREST, UNITED STATES DEPARTMENT OF AGRICULTURE; KAIBAB INDUSTRIES, AN ARIZONA CORPORATION; AND WESTERN WOOD PRODUCTS ASSOCIATION, INTERVENOR, APPELLANTS

Appeals from the United States District Court for the District of Colorado

Jacques B. Gelin, Department of Justice, Washington, D.C. (*Walter Kiechel, Jr.*, Acting Assistant Attorney General; *James L. Treece*, United States Attorney; *James R. Richards*, Assistant United States Attorney; *S. Billingsley Hill* and *Nelson H. Grubbe*; were with him on the brief) for Appellant, United States of America.

Thomas J. Trimble, Phoenix, Arizona, (*Donald C. McKinlay* was with him on the brief) for Appellant, Kaibab Industries.

H. Anthony Ruckel and *Donald M. Carmichael*, Denver, Colorado, (*William A. Hillhouse, II* and *Tom W. Lamm* were with them on the brief) for Appellees.

H. Anthony Ruckel for Appellee, Colorado Open Space Council, and for Appellees *Robert W. Parker*, et al.; *John W. Young* and *Richard D. Lamm* on brief for Environmental Defenders, Inc. and *Howard Gelt* on brief for Colorado Environmental Legal Services, Amici Curiae.

James P. Rogers, Portland, Oregon, (*John Tippit* was with him on the brief) for Appellant-Intervenor, Western Wood Products Association; and *Noble K. Gregory and George A. Sears*, on the brief for Western Lumber Manufacturers, Inc., Amici Curiae.

Before LEWIS, Chief Judge, PICKETT and ADAMS,* Circuit Judges.

LEWIS, *Chief Judge:* This appeal is taken by the United States, the Secretary of Agriculture, certain named subordinate federal officials, an intervenor, and Kaibab Industries, a lumber company, from a judgment of the District Court for the District of Colorado enjoining the federal appellants and their contractor, Kaibab, from performing a contract of sale and harvest of designated timber located on public lands in the state of Colorado. The subject lands adjoin but are not contained within the bounds of a designated primitive or wilderness area and thus the case presents issues of first impression requiring interpretation of the Wilderness Act of September 3, 1964, 78 Stat. 890 and particularly section 3(b) of the Act, 16 U.S.C. § 1132(b) which provides:

> The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation

* Of the Third Circuit, sitting by designation.

as wilderness, each area in the national forests classified on September 3, 1964, by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. . . . *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.* Notwithstanding any other provisions of this chapter, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range—Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest. [Emphasis added.]

The judgment of the district court has multiple effects:

(1) It determines as a fact that the timber contract pertains to an area, the East Meadow Creek Area of White River National Forest, that is predominantly of wilderness value and contiguous to the Gore Range-Eagles Nest Primitive Area; (2) it enjoins the sale and harvest of timber in the East Meadow Creek Area of White River National Forest until a determination is made by the President and Congress regarding the area's inclusion in a wilderness area to be created from the Gore Range-Eagles Nest Primitive Area and suitable contiguous lands; (3) it requires that the East Meadow Creek Area, because of its wilder-

ness character and contiguousness to the Gore Range-Eagles Nest Primitive Area, be included in the wilderness study report of the Secretary of Agriculture to the President and Congress. The memorandum opinion of the trial court is found at 309 F. Supp. 593. Appellants contend the judgment must fail for lack of jurisdiction, characterizing the injunction as an unauthorized interference with a discretionary management function authorized by Congress and stemming from an unconsented suit against the United States. Kaibab and interested lumber interests add the contention that appellees have failed to exhaust their administrative remedies.

The cases defining and interpreting the extent and limitations on judicial review of administrative decisions are multitudinous but have recently been brought into proper perspective with remarkable clarity by the Supreme Court in Citizens to Preserve *Overton Park, Inc. v. Volpe*, 401 U.S. 402. We there learn that administrative decisions such as the one here considered are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701, unless specifically prohibited by the Congress or falling within the "narrow exception" of agency action committed to the wide discretion of the administrative body by law as evidenced by clear congressional intent. *Citizens to Preserve Overton Park, supra* at 410. This "wide" discretion within the agency is never judicially unapproachable when there is "law to apply." *Id.* at 410.

We have no difficulty in recognizing the general purpose of the Wilderness Act. It is simply a congressional acknowledgement of the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty inroads of man, usually commercial in nature, and the enactment of a

"proceed slowly" order until it can be determined wherein the balance between proper multiple uses of the wilderness lies and the most desirable and highest use established for the present and future. A concerned Congress, reflecting the wishes of a concerned public, did by statutory definition choose terminology that would seem to indicate its ultimate mandate.

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable is preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c)

Having initially established by definition that a wilderness cannot remain a wilderness if man invades and remains, the Act made at least three further provisions pertinent to our case. It designated the Gore Range-Eagles Nest Primitive Area, and other comparable areas, a preserved wilderness subject to some exceptions not here involved. It required the Secretary of Agriculture, through 16 U.S.C. § 1132(b), to

review and report as findings to the President, and within a time certain, the suitability or nonsuitability of all such areas for preservation as wilderness within the National forests. In turn, the President was directed to advise the Congress of his recommendations on the subject *but*, as earlier emphasized in our citation of this section, the President was not to be bound by the action of the Secretary or findings of the Secretary and could recommend that the designated primitive areas be enlarged by the addition of contiguous areas predominantly of wilderness value.

Appellants do not attack the finding of the trial court, as such, that the East Meadow Creek Area is of wilderness value. And, indeed, the finding is supported by the record considered under any standard of appellate review. *See* 309 F. Supp. 593, 601. But of course such finding has no significance unless there is "law to apply," in that 16 U.S.C. §1132(b) clearly means that the President and Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation. The lumber industry appellants do attack the trial court's designation of the contract lands as "contiguous" to the preserved wilderness area by pointing out that the Forest Service, after listening to various protests concerning the original contract contemplated with Kaibab, reduced the number of board feet in the proposed contract and in so doing preserved a bumper area between East Meadow Creek and the Gore Range-Eagles Nest Primitive Area. We are not impressed with this contention. The preservation of a "bumper" area does not probe the basic question presented, merely serves to lessen the impact of the agency action, and does not justify such action if otherwise prohibited. We reject this contention as dispositive of our issue.

Because this case is one of first impression, all appellants very properly set out the legislativ history of the Wilderness Act as an argumentative premise that the Act was not intended to constitute a drastic cutback in the discretionary management judgment of the concerned administrative agencies and that the Act was intended to supplement and not supplant the Multiple Use-Sustained Yield Act of June 12, 1960, 16 U.S.C. § 528, *et seq.* And, indeed, the legislative history of the Act does reflect constant reassurance to lumber, grazing, and other such interests by many informed members of Congress that the legislation does not and cannot adversely affect their legitimate interests. However, these portions of the legislative history would appear to be directed to those provisions of the Act which locked in the statutory designated wilderness areas for a time, in most instances certain, and which were already unavailable for commercial development under existing administrative policy and rulings. Since the Act only accepted as wilderness those areas then designated and did not extend the designation, wilderness remained unaffected by the statute and any concern of commercial interests in that regard was not warranted. We accept the legislative history of the Act as indicating reassurance of current administrative policy regarding existing wilderness areas and reassurance to commercial interests that no change was contemplated to their then existing potentials. So, too, we accept the legislative history of the Act as indicating its terms should not be interpreted as a general curtailment of agency discretion in the normal day-by-day administration of the national forests, parks or other public lands. But we find nothing in the Wilderness Act as written or in its legislative history in formulation that would support an ambiguity in word or intent

dictating an error in the interpretation of section 1132(b) as made by the trial court.

It is, of course, a cardinal rule of statutory construction that effect should be given to every provision of a statute, *Salt Lake County v. Utah Copper Co.*, 10 Cir., 93 F2 127, 133. Should we, in the case at bar, concede to federal appellants the discretionary right to destroy the wilderness value of the subject area, one contiguous to a designated wilderness, we would render meaningless the clear intent of Congress expressed in 16 U.S.C. § 1132(b) that both the President and the Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation. This statutory limitation on agency discretion is, of course, a narrow one dictated by necessity as contained in the definition of wilderness and by the specifics of the statutory words creating the limitation.

The third and final aspect of the trial court's injunction affirmatively requires the federal appellants to include its study of the East Meadow Creek Area in its report to the President and Congress. Justification for this requirement is found in the regulations of the Forest Service itself.

The Forest Service, rather than include its detailed regulations in the Code of Federal Regulations, maintains the Forest Service Manual (FSM). The section of the regulations which is most helpful in the construction of 16 U.S.C. § 1132(b) is FSM § 2321(1):

> Each Primitive Area (so classified as of September 3, 1964) *and contiguous lands which seem to have significant wilderness resources* will be studied to determine whether to recommend that all or part should be included in

the National Wilderness Preservation System. [Emphasis added.]

Following ESM § 2324(1) are lengthy and detailed directives describing the manner in which studies are to be made, listing the factors to be considered in making recommendations, giving instructions for conducting public hearings, and recognizing that the duty of the Forest Service is to study and recommend and that the President and Congress are to make the final determinations. The regulations contain not just one, but many, references to the study of contiguous areas of significant wilderness value. It seems clear from the Forest Service's regulations that its construction of the Wilderness Act is in full accord with the decision of the court below. Indeed, the testimony and exhibits offered at trial show that the Forest Service has scrupulously adhered to the regulations and the statutory scheme in other wilderness reviews and recommendations. A review of the exhibits offered at trial shows numerous recommendations for addition of contiguous areas to the primitive areas for final wilderness classification.

The trial court, having determined as a fact that the East Meadow Creek Area had predominantly wilderness value which should be preserved for consideration at the executive and congressional level, was completely justified in directing inclusion of a study of the area in the mandated report to the President. This requirement in no way directs or limits the Secretary in his full discretionary right to make such recommendation to the President as he may deem proper.

We conclude, as did the trial court, that 16 U.S.C. § 1132(b) sets out "law to apply" under the facts of the case at bar and hold that consequently this ac-

tion and the judgment neither constitute an unauthorized suit against the United States nor an unjustified judicial interference with the management powers of federal appellants.

As earlier indicated, the lumber industry appellants (but not federal appellants) assert that appellate review in the case should be rejected because appellees failed to exhaust administrative remedies before instituting the action. The decision to contract with Kaibab to harvest the East Meadow Creek Area was made by the Regional Forester. Applicable regulations provide for an administrative appeal from such decisions to the Chief of the Forest Service. From the decision of the Chief an appeal is available to the Secretary of Agriculture. 36 C.F.R. 211.20 *et seq.* It is undisputed that the plaintiffs did not pursue their right of appeal through the prescribed administrative process.

The issue of exhaustion of administrative remedies is raised for the first time on appeal and should therefore be given no consideration by this court, *Stephens Industries, Inc.* v. *Haskins & Sells*, 10 Cir., 438 F2 357, unless favorable consideration of the issue defeats jurisdiction. *Seidenbach's* v. *Bland Terry Shoe Corp.*, 10 Cir., 292 F2 206, *cert. denied*, 368 U.S. 933. We can conceive of no legal nor logical reason why the doctrine of exhaustion of administrative remedies should be applied in this case at this late date. The reasons are many and manifest: There is no legislative mandate requiring such exhaustion; the dispositive issue is one of pure law requiring no application of administrative expertise, *see Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557; *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426; the desir-

ability of saving judicial time through insistence on administrative exhaustion is no longer applicable and would now amount to a mockery; the record clearly reflects that the administrative decision was informally considered through all levels of the appropriate agencies; the doctrine is applied for the benefit of orderly procedure in the administrative and judicial process and not for the benefit of third parties.

The judgment is affirmed.

APPENDIX B

SEPTEMBER TERM—OCTOBER 1, 1971

NOS. 404-70, 405-70, 406-70

ROBERT W. PARKER, ET AL., APPELLEES

v.

UNITED STATES OF AMERICA; CLIFFORD HARDIN, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES; EDWARD P. CLIFF, INDIVIDUALLY AND AS CHIEF, UNITED STATES FOREST SERVICE; DAVID S. NORDWALL, INDIVIDUALLY AND AS REGIONAL FORESTER; JAMES O. FOLKESTAD, INIVIDDUALLY AND AS SUPERVISOR, WHITE RIVER NATIONAL FOREST, UNITED STATES DEPARTMENT OF AGRICULTURE; KAIBAB INDUSTRIES, AN ARIZONA CORPORATION; AND WESTERN WOOD PRODUCTS ASSOCIATION, INTERVENOR, APPELLANTS.

Before Honorable DAVID T. LEWIS, Chief Judge; and Honorable JOHN C. PICKETT and Honorable ARLIN M. ADAMS (of the Third Circuit), Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

A true copy.
Teste:
HOWARD K. PHILLIPS,
Clerk, U.S. Court of Appeals,
Tenth Circuit.

By
HEIDE BARTHEL,
Deputy Clerk.

APPENDIX C

United States District Court, D. Colorado

Civ. A. No. C-1368

Feb. 27, 1970

ROBERT W. PARKER ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, CLIFFORD HARDIN, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES, EDWARD P. CLIFF, INDIVIDUALLY AND AS CHIEF, UNITED STATES FOREST SERVICE, DAVID S. NORDWALL, INDIVIDUALLY AND AS REGIONAL FORESTER, JAMES O. FOLKESTAD, INDIVIDUALLY AND AS SUPERVISOR, WHITE RIVER NATIONAL FOREST, UNITED STATES DEPARTMENT OF AGRICULTURE AND KAIBAB INDUSTRIES, AN ARIZONA CORPORATION, DEFENDANTS.

MEMORANDUM OPINION AND ORDER

WILLIAM E. DOYLE, *District Judge:* This is a suit in which the plaintiffs seek to enjoin the defendants Secretary of Agriculture and the United States Forest Service from selling to the defendant Kaibab Industries 4.3 million board feet of Englemann Spruce, Lodgepole Pine and fir, which the defendant Kaibab proposes to cut and purchase from the United States. The sale area is in East Meadow Creek, which is part of the White River National Forest near Vail, Colorado. The plaintiffs are either residents and property owners at Vail, Colorado, or conservation organizations. The plaintiffs assert that the East

Meadow Creek area within which the Forest Service and Kaibab Industries propose to harvest the 4.3 million board feet of Engelmann Spruce, Lodgepole Pine and fir, is of such character as to qualify as wilderness under the 1964 Wilderness Act, 16 U.S.C., § 1131 et seq. Plaintiffs further allege that the decision of the defendants to sell the timber violates the letter and the spirit of the Wilderness Act together with the Forest Service's own regulations.

In essence the claim is that East Meadow Creek, which includes the proposed sale area, is contiguous to the Gore-Range Eagles Nest Primitive Region and that its character is substantially wilderness. Plaintiffs further assert that the defendants have not studied the area; that the Act and Forest Service regulations contemplate that there shall be a study; that the President and Congress shall have an opportunity to consider a contiguous area of the character of the present one for inclusion in an existing wilderness or primitive area; that the sale of the 4.3 million board feet plus the building of the necessary access roads and the harvesting and removal of the timber would irreparably destroy the wilderness character of this area.

This cause has been before the Court on the defendants' motion for summary judgment, 307 F. Supp. 685. This motion was denied and on that occasion we held that

> 1. There was jurisdiction over the subject matter;
>
> 2. Plaintiffs have standing to bring the suit;
>
> 3. The doctrine of sovereign immunity does not bar the action;
>
> 4. Plaintiffs should have an opportunity to present evidence as to the wilderness qualities of East Meadow Creek and their ecological interrelationship with the contiguous Gore Range-Eagles Nest Primitive Region.

Pursuant to this ruling a trial to the Court was had. Considerable evidence concerning the nature of the area has been received and the cause has been submitted for a decision. We are of the opinion that formal findings of fact and conclusions of law are unnecessary since the basis of our holding herein is primarily a matter of law. Necessary findings of fact will be set forth in narrative form.

The Gore Range-Eagles Nest Primitive Area has been classified as such by the Forest Service since June 19, 1931, long prior to the adoption by Congress of the Wilderness Act. It is located about 90 miles west of Denver within the Arapahoe and White River National Forests and has a total area of about 61,000 acres. Included within it is about 30 miles of the so-called Gore Range of mountains, which is regarded as one of the most inaccessible ranges within the State of Colorado. Mt. Powell, having an elevation of 13,534 feet, is located within the area, and there are said to be approximately 17 other peaks with elevations in excess of 13,000 feet. The elevations range from 8,500 feet to 13,500 feet, and the greater part of this region is classified as alpine. The East Meadow area is said to be sub-alpine. There are major streams and large lakes in the Gore area and a good many deer, elk, mountain sheep and small animals. There are no improvements other than a few abandoned cabins and temporary corrals. There are, however, extensive foot and horse trails maintained by the Forest Service.

East Meadow Creek area is, as we have indicated, contiguous to the Gore Primitive Region on the west. It consists of timbered valleys surrounded by timbered ridges. Within it are several parks, small grassy open areas, from one acre to fifty acres surrounded by trees. On the average, the elevation of the East

Meadow Creek region is about 10,000 feet, which is somewhat lower than the contiguous primitive area. It is located in what is known as the sub alpine life zone. It is situated so that it may be used as an access route into the Gore Primitive Area.

The proposed sale area is located within the East Meadow Creek basin, in the Piney Lake Compartment, Eagle River Block, Holy Cross Working Circle, White River National Forest. It consists of some 1,200 acres with an elevation between 9,200 and 10,500 feet. Deer and elk are found in the sale area throughout the summer and fall months and there is light recreation use in the region during the hunting season. The trees in the sale area consist mainly of Engelmann Spruce and Lodgepole Pine, some of which are as much as 350 years old, and fir, the age of which ranges up to 120 years.

The East Meadow Creek region is generally untrammeled by man except for an access road which runs to a point about three fourths of a mile inside the sale area. There is also a road known as the "bug road" which was constructed during the bark beetle control project in the early 1950's. This road is now blocked off and cannot be used by motorized vehicles. In some places the vegetation has camouflaged the "bug road" so that it is substantially unnoticeable. There are trails in the area.

The Denver Water Board is surveying, looking to possible use of the Meadow Creek drainage in connection with a water diversion project. There is also a possibility that a dam may be built at Piney Lake. These, however, are apparently in the early planning stages, and no definite decisions to undertake the projects have yet been made.

Substantial evidence has been presented as to the character of East Meadow Creek. The witnesses for

plaintiff have testified that it is wild in that it is inhabited by animals, is thickly wooded, secluded and unspoiled. Witnesses who are familiar with wilderness say that a wilderness experience can be obtained in this area and that it is fairly accessible. They have also testified that this is an important tourist attraction which is a great source of value to Vail and which brings enjoyment to the tourists who visit it during the spring, summer and fall of each year.

Defendants' evidence does not create any serious dispute concerning the essential character of this area. Rather, they contend that their access road of itself prevents East Meadow from being classified as either primitive or wilderness, and that mining claims plus Denver Water Board surveys plus their own positive plans for the area make it more suitable for timber harvesting than for wilderness use.

It is crystal clear from the evidence that the consummation of the present sale will effectively take all of East Meadow Creek out of contention as a primitive or wilderness addition.

The original decision to harvest timber in the East Meadow Creek sale area was made sometime in the late 1950's or early 1960's, prior to the adoption of the Wilderness Act. The road was planned prior to the Act and was completed in 1965. As of that time the Forest Service was committed to a sale of the timber. It looked to the sale to pay for the road and its extensions. A multiple use survey report on the proposed contract area was issued in 1967 and a sale area planning report was approved in 1968. The timber involved in the sale constitutes approximately 4.3 million board feet. About four miles of additional haul road, as well as most secondary and spur logging roads, would be, under the contract, constructed by the purchaser.

Throughout the 1960's, and even after the passage of the Wilderness Act, 16 U.S.C. § 1131 et seq., in 1964, the Forest Service considered the East Meadow Creek area as being governed solely by the Multiple Use Act, 16 U.S.C. § 528 et seq. The Wilderness Act was felt to be inapplicable because of the road which had been constructed in the sale area and also because of the plans of the Denver Water Board. On October 4, 1967, the Wilderness Workshop of the Colorado Open Space Coordinating Council submitted a "Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness (Gore Range-Eagles Nest Primitive Area) of Approximately 111,000 Acres," which proposal suggested that a large portion of the area contiguous to the Gore Primitive Region be classified as wilderness. This included much of East Meadow Creek, but excluded the East Meadow Creek Road (*see* map, Appendix I). On February 13, 1969, the Eagles Nest Wilderness Committee submitted a revision of the October 4, 1967 report. This revision recommended that East Meadow Creek be included as wilderness, but excluded both the East Meadow Creek Road and Piney Lake (*see* map, Appendix II). The Forest Service was unmoved by these proposals, making clear to the plaintiffs that East Meadow Creek would not be included in the study and report to the President and Congress on the Gore Primitive Area and that the proposed sale and harvesting of timber would proceed as planned. The plaintiffs then instituted the present suit.

The question presented is a limited and novel one. We are concerned not with whether the Secretary erred on his factual findings in ruling East Meadow Creek out as wilderness, but rather with whether there is sufficient evidence of its wilderness character so as to require study and submission to the President

and Congress for determination of its character and whether acts which would change its character should be enjoined until the determination can be made.

The concept of preserving certain public lands in their natural state did not originate in the Wilderness Act. For many years primitive, wilderness, and wild areas have been set aside by the Secretary of Agriculture and the Chief of the Forest Service.[1] Under the Multiple Use-Sustained Yield Act, 16 U.S.C. § 529, this authority of the Secretary of Agriculture to preserve wilderness was specifically recognized.[2] However, prior to the Wilderness Act, the issue of what areas should be designated as wilderness, wild or primitive, and what uses might be made of such areas was entirely within the discretion of the Secretary of Agriculture and the Forest Service. Thus, the administrative decisions with respect to the suitability of an area for wild, wilderness or primitive classification, the need for preserving the natural state of such an area, and the relative values of various resources in the particular area were final and unreviewable. One

[1] In 1939, the Secretary of Agriculture established procedures for designation of primitive areas in national forests. This was superseded in 1939 by regulations establishing procedures for designation of wilderness and wild areas. 36 C.F.R. 251.20–.21 (1967). Wilderness areas had to be in excess of 100,000 acres and could only be designated by the Secretary of Agriculture. Wild areas consisted of between 5,000 and 100,000 acres and could be designated by the Chief of the Forest Service. H.R. Rep. No. 1538 on the Wilderness Act. 2 U.S. Code Cong. & Adm. News pp. 3615, 3616 (1964).

[2] The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. * * * The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528–531 of this title. 16 U.S.C. § 529.

of the major purposes of the Wilderness Act was to remove a great deal of this absolute discretion from the Secretary of Agriculture and the Forest Service by placing the ultimate responsibility for wilderness classification in Congress. The House Report on the Wilderness Act recognizes this as the primary purpose for the Act:

> A statutory framework for the preservation of wilderness would permit long range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited.
>
> The committee accordingly endorses the concept of a legislatively authorized wilderness preservation system. Furthermore, by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution to exercise jurisdiction over the public lands. H.R.Rep. No.1538 on the Wilderness Act, 2 U.S.Code Cong. & Adm.News at pp. 3646 47 (1964).

Congress has defined wilderness as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable;

> (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c).

We are called upon in this case to determine whether under the evidence presented there is a basis for determination by the President and Congress that the area in question is wilderness within the above definition. It is obvious, of course, that the area here involved does not encompass 5,000 acres. At the same time it is, as noted, contiguous to the Gore Range Wilderness Area which has been classified as such, and it is contended that the President and Congress should determine whether this contiguous area should be included.

See 16 U.S.C. § 1132(b) which provides as follows:

> The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. * * * *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.* [Emphasis added.]

With respect to primitive areas, this provision of the Act quite clearly reserves the decision to classify as wilderness to the President and ultimately Congress. The duty of the Secretary of Agriculture is to study and recommend, and this duty is mandatory.

East Meadow Creek, however, is not classified as a primitive region, but rather is *contiguous* to the Gore Primitive Area. With respect to such contiguous areas, the Act is less specific as to the division of responsibility between the Forest Service and Secretary of Agriculture on the one hand and the President and Congress on the other. Nevertheless, the last sentence of 16 U.S.C. § 1132(b) leaves no doubt that at least as to those contiguous areas which are predominantly of wilderness value, the decision to classify or not to classify them as wilderness *must remain open through the Presidential level.*

It follows from the above that

1. The Wilderness Act, § 1132(b), empowers the President to recommend to the Congress the addition of contiguous primitive area of national forest lands predominantly of wilderness value.

2. The Act contemplates that the President shall be in a position to exercise a meaningful decision with respect to contiguous areas.

3. The Act contemplates that the Secretary shall consider whether a contiguous area is to be included and that its determination is subject to review by the President and ultimately the Congress.

4. Where as here the contiguous area is shown by the evidence to have wilderness character, it thwarts the purpose and spirit of the Act to allow the Forest Service to take abortive action which effectively prevents a Presidential and Congressional decision.

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[2] We are fully aware of the provision in 16 U.S.C. § 1132(b)

These basic rules which we have outlined above are fully supported by the regulations set forth in the Forest Service Manual.[4] These regulations are designed to aid Forest Service personnel in carrying out their duties under the Wilderness Act.

Forest Service regulation 2321(1) provides that:

> Each Primitive Area (so classified as of September 3, 1964) *and contiguous lands which seem to have significant wilderness resources* will be studied to determine whether to recommend that all or part should be included in the National Wilderness Preservation System. (Emphasis added.)

This regulation is basically a definition of the duties imposed upon the Forest Service by § 1132(b) of the Wilderness Act. It requires that the Forest Service study "contiguous lands which seem to have significant Wilderness resources," and thus supports this Court's conclusion that the duties of the Forest Service under the Wilderness Act are not limited to merely studying the primitive areas.

Of course, not every area which is contiguous to a primitive region need be studied, but rather only those contiguous areas which "seem to have significant Wilderness resources." We consider this latter

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which states, "Areas classified on September 3, 1964 shall continue to be administered under the rules and regulations affecting such areas on September 3, 1964 until Congress has determined otherwise." Although this provision does vest some discretion in the Forest Service prior to the ultimate Congressional decision, we do not feel that it can or should be read so as to allow the Forest Service to change the basic character of the area. Such a broad reading of the above provision would allow the Forest Service to frustrate one of the major purposes of the Wilderness Act.

[4] Plaintiffs' Exhibit 1a, b & c.

phrase as referring to contiguous areas which meet the minimum condition of suitability for wilderness as defined in Forest Service regulation 2321.11(a) (which regulations are, of course, derived from the Act itself):

> 2321.11a *Minimum Conditions.* Most of the area must satisfy, and all of the area must be such that it can be made to satisfy, the definition of Wilderness as set forth in the Wilderness Act.
>
> 1. As an area where the earth and its community of life are untrammeled by man; where man himself is a visitor who does not remain.
>
> 2. As undeveloped land retaining its primeval character and influence, without human habitation or permanent improvements, except those that are necessary to meet the minimum requirements for administration and authorized use of the area.
>
> Generally appearing to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable.
>
> 3. As having outstanding opportunities for solitude or a primitive and unconfined type of recreation.
>
> May also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.
>
> 4. As normally having at least 5,000 acres of land. In rare instances an area may be smaller; but if so, it must be of sufficient size to make practicable its preservation and use in an unimpaired condition.

There are other criteria which must be met by primitive areas and areas contiguous to primitive regions alike before the Forest Service may give a positive recommendation to the President and Congress that the particular area be classified as wilderness. For example, both availability and need must

be considered. Forest Service Reg. 2321.1. Undoubtedly, as the Forest Service contends, the questions of availability and need are complex and require substantial expertise in the field of land use management for their resolution. Thus, they must be left largely to the discretion of the Forest Service.

However, we are not here concerned with the issue of whether or not the Forest Service must *recommend* East Meadow Creek for wilderness classification. Nor would we undertake to second guess the Secretary by a ruling that the area in question is wilderness. The only issue presented to this Court is whether the Forest Service must under the Act and its own regulations *study* East Meadow Creek, include that study in its report to the President and Congress, and refrain from acts such as the cutting of timber, which will irrevocably change its character, until the President and Congress have considered the report and rendered a decision. As stated in the Forest Service Manual, the answer to this question does not require a consideration of need or availability, but only a determination as to whether East Meadow Creek seems to possess the inherent qualities of suitability as wilderness. This determination, based as it is on substantially objective criteria set forth in both the Wilderness Act and Forest Service regulations, is as stated above largely a matter of law.

[1] The Forest Service has recognized this basic difference between the decision to study a particular region and the decision to make a positive recommendation that it be classified as wilderness. For example, in the Forest Service Report on the Flat Tops Wilderness, Plaintiffs' Exhibit 8a, several areas contiguous to the Flat Tops Primitive Area which had been suggested by interested groups for classification as wilderness were studied and included in the Forest Service Report, even though the Service ultimately determined not to recommend the areas as wilderness. *See also* Proposal for Mt. Jefferson Wilderness, Plaintiffs' Exhibit 8m.

Hence, we are not invading any Forest Service field of expertise. We simply hold that the Forest Service does not have uncontrolled discretion where the area is contiguous to wilderness lands and is shown to be primitive in character; that the determination must be preserved for the President and Congress; that it is not to be preempted. We, therefore, conclude that the issue as to whether a given contiguous area is suitable for wilderness classification, and hence must be studied and included in the Forest Service report to the President and Congress, is a question which is subject to judicial review.

Defendants contend that the East Meadow Creek region was included in a study made pursuant to the Multiple Use Sustained Yield Act, 16 U.S.C. § 528 et seq. and was found not qualified for primitive, wild, or wilderness classification. Thus, it is claimed that the Forest Service has in effect also fulfilled its duty under the Wilderness Act and any further study of East Meadow Creek would be duplicitous. Again, this argument mistakes the function of the Forest Service with respect to wilderness area under the Wilderness Act as compared with the Multiple Use Act. Under the Multiple Use Act, the authority to classify as wilderness, primitive, or wild was vested solely in the Secretary of Agriculture or the Forest Service, and the decision on these matters was based not only on suitability, but also on availability and need. Since the Wilderness Act requires a study and report on those regions contiguous to primitive areas which merely meet the test of suitability, the Forest Service's conclusions under the Multiple Use Act are not conclusive and indeed have little bearing on the question of whether East Meadow Creek must be included in the wilderness study report to the President and Congress.

In applying the criteria of suitability set forth in the Wilderness Act and Forest Service regulations to East Meadow Creek, we find that at least that portion of East Meadow Creek included in the Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness, First Revision, February 13, 1969, seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value. Outside of the presence of the East Meadow Creek Road, the area in question is untrammeled by man. The Citizens' Proposal does not include the East Meadow Creek Road, and the testimony indicated that due to the dense forest conditions, this road is substantially unnoticeable from approximately 100 yards away. There was also testimony that East Meadow Creek has outstanding opportunities for solitude and a primitive and unconfined type of recreation, including hunting, hiking, back-packing, and camping. Furthermore, this region is significantly interrelated with the Gore Primitive Area. Not only is it geographically contiguous to the Gore, but it also serves as an access route into the primitive area. Although East Meadow Creek and the Gore Primitive Area are in different life zones due to the differences in altitude, both regions are inhabited by deer and elk, and the testimony indicated a possibility that destruction of the natural state of East Meadow Creek might have an adverse effect on this wildlife. The evidence shows that it is desirable to have both alpine and sub-alpine zones within a wilderness area.

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[*] The Citizens' Proposal includes a significant portion of the proposed sale area encompassing partial cuts 6 and 12.

In conclusion, we hold that the East Meadow Creek region meets the minimum requirements of suitability for wilderness classification and must, therefore, be included in the study report to the President and Congress. Furthermore, we find that if the proposed sale and harvesting of timber proceeds, it will frustrate the purpose of the Wilderness Act to vest the ultimate decision as to wilderness classification in the President and Congress, rather than the Forest Service and Secretary of Agriculture. The Forest Service has been considering the proposed sale of timber in East Meadow Creek for several years. The decision to sell and harvest having now been made, the Service claims that the plans must proceed immediately. We must disagree. The interests of the plaintiffs and the public in maintaining the status quo until the requirements of the Act have been fulfilled far outweigh this desire to get the job done now after more than ten years of delay.

We are not unmindful of the interests and equities of Kaibab Industries, but here again we cannot give effect to this interest, for the cutting of the trees, is as we have noted, too final and conclusive. It must await the processes of law.

We conclude then that the cause is a proper one for equitable intervention. We determine that the preliminary injunction heretofore entered be continued indefinitely or until a determination has been made by the President and Congress that East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range-Eagles Nest or that it should not be.

Plaintiffs will submit an appropriate judgment for the Court's signature.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

KAIBAB INDUSTRIES, WESTERN WOOD PRODUCTS ASSOCIATION,
Petitioners,

vs.

ROBERT W. PARKER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

KAIBAB INDUSTRIES, WESTERN WOOD PRODUCTS ASSOCIATION,
Petitioners,

vs.

ROBERT W. PARKER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

Kaibab Industries and Western Wood Products Association pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

This petition is companion to the petition of the United States and other Federal parties for review of the same judgment filed herein on January 13, 1972 (*United States, et al. v. Robert W. Parker, et al.*, No. 71-915).

OPINIONS BELOW

The opinion of the court of appeals is reported at 448 F.2d 793. The opinion of the district court affirmed thereby

is reported at 309 F.Supp. 593. Those opinions and the final orders of the court of appeals and the district court are printed in Appendix B hereto.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1971. By order dated December 28, 1971, Mr. Justice Marshall granted the application of these petitioners for an extension of time within which to file this petition to January 31, 1972. The jurisdiction of this Court is invoked under section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether the courts have authority under the Wilderness Act (a) to compel the Secretary of Agriculture to make a formal review and recommendation to the President as to whether national forest lands outside a Primitive Area should be included in the Wilderness System, and (b) to enjoin multiple use management of such lands until the Congress has determined whether or not the lands should be designated a Wilderness Area.

2. Whether the courts below have rewritten section 3(b) of the Wilderness Act by converting a "saving clause" intended to permit discretionary boundary recommendations into a mandatory obligation of the Secretary of Agriculture.

3. Whether the district court improperly substituted its own finding as to the "wilderness value" of the East

Meadow Creek area for the finding of the Forest Service that it was better suited for multiple use.

STATUTES INVOLVED

The case turns on the interpretation of and the relationship between provisions of the Multiple Use-Sustained Yield Act of 1960 (the "Multiple Use Act") and section 3(b) of the Wilderness Act of 1964 (the "Wilderness Act").

Multiple Use Act, section 1:

> "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes. * * *"

Wilderness Act, section 3(b):

> "(b) The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as 'primitive' and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as 'wilderness' or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. * * * Each recommendation of the President for designation as 'wilderness' shall become effective only if so provided by an Act of Congress. Areas classified as 'primitive' on September 3, 1964 shall continue to be administered under the rules and regu-

> lations affecting such areas on September 3, 1964 until Congress has determined otherwise. * * * Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. * * *."

The Wilderness Act (78 Stat. 890; 16 U.S.C. 1131-1136) and the Multiple Use Act (74 Stat. 215; 16 U.S.C. 528-531), and applicable provisions of the Act of June 4, 1897 (30 Stat. 35; 16 U.S.C. 475, 476) are printed in full text in Appendix A hereto.

STATEMENT OF THE CASE

Respondents brought this action to enjoin the United States, the Secretary of Agriculture and the Forest Service from performing a contract awarded on April 15, 1969, to Kaibab Industries for sale of 4.3 million board feet of timber in the East Meadow Creek area of the White River National Forest. The East Meadow Creek area consists of about 3,000 acres of national forest lands adjoining the Gore Range-Eagle's Nest Primitive Area. The sale area consists of a tract of about 1,200 acres located about two miles at the nearest point from the boundary of the Primitive Area.

After filing of the complaint, the district court on its own motion ordered that Kaibab Industries be made a

party defendant, and permitted Western Wood Products Association to intervene as a party defendant.

Petitioners moved for summary judgment on the ground that management of the East Meadow Creek area was committed to the discretion of the Forest Service. The district court denied the motion and ordered the case for trial (307 F.Supp. 685).

At trial, respondents presented evidence tending to show that the East Meadow Creek area had wilderness value.

The Forest Service showed that it had intensively reviewed and reported on the resources of the East Meadow Creek area and the national forest of which it is a part, both before and after enactment of the Wilderness Act in 1964 (see p. 12, infra, n. 4 and n. 5). The Forest Service reports considered in detail the relative values of the multiple use resources of the East Meadow Creek area for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The wilderness expert on the Forest Service regional staff, the District Ranger and his staff, and the Forest Supervisor and his staff studied all aspects of the East Meadow Creek area, including its wilderness value. The Regional Forester reviewed the studies and discussed them with the Chief of the Forest Service. (Appx., p. 324).[1] The Forest Service concluded that the East Meadow Creek area should continue to be available for multiple use purposes, that it was not predominantly of wilderness value, and that it thus should not

[1]Page citations are to the printed Appendix in the Tenth Circuit Court of Appeals.

be recommended to the President as a possible wilderness area (Appx., p. 343).

The district court proceeded to make its own finding that the area "seems to have significant wilderness resources" (309 F. Supp. 601). On the basis of that finding, the court held that, under section 3(b) of the Wilderness Act, "the East Meadow Creek region [must] be included in the wilderness study report of the Secretary of Agriculture to the President and Congress," and enjoined any other use of the region "indefinitely or until a determination has been made by the President and Congress that East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range-Eagle's Nest or that it should not be."

The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. These petitioners join in and support the reasons for granting the writ set forth in the petition of the United States and other Federal parties filed herein on January 13, 1972, in *United States, et al. v. Robert W. Parker, et al.*, No. 71-915.

The case involves a judicial interpretation of section 3(b) of the Wilderness Act which places it in direct conflict with the Multiple Use Act—with major consequences for both statutes. The interpretation results in frustration of congressional objectives and unauthorized interference with management responsibilities of the Forest Service over large areas of national forest lands.

2. Section 2(a) of the Wilderness Act provides for establishment of "a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas' * * *; and no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act." Only areas so designated are to be removed from multiple use management.

Congress specified precisely (a) what areas were to be included at once in the National Wilderness Preservation System, and (b) what areas were to be studied by the Forest Service for possible later recommendation to Congress for inclusion in the Wilderness System.

Section 3(a) included in the Wilderness System "all areas within the national forests classified at least thirty days before September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as 'wilderness,' 'wild' or 'canoe'"—approximately 9,120,000 acres.

Section 3(b) directed a review of areas theretofore designated as "primitive areas" by the Forest Service—approximately 5,480,000 acres. Such areas had not received the study given by the Forest Service to wilderness, wild and canoe areas. Congress retained for itself the right to determine those Primitive Areas or portions thereof to be added to the Wilderness System.

Section 3(b) provides specific procedures for evaluating Primitive Areas. The Secretary of Agriculture is required to review all areas classified as "primitive" on September 3, 1964, as to suitability or nonsuitability for preservation as wilderness, and to report his findings to the President. The President is directed to advise the

Congress of his recommendations with respect to the designation as "wilderness" or other reclassification of each Primitive Area over which review has been completed. No recommendation for designation as "wilderness" has any effect unless the full-fledged legislative process results in a new act of Congress adding such area to the Wilderness System.

Section 3(b) then provides for the administration of Primitive Areas to continue under Forest Service rules in effect when the Wilderness Act was adopted until Congress has determined otherwise.

After all the foregoing provisions comes the sentence in section 3(b) on which the courts below relied:

> "Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value."

In the context of the clear mandate for affirmative action by the Secretary of Agriculture and the President as to "wilderness" and "primitive" areas, that sentence provides a necessary and desirable leeway in what otherwise would have been a crystallized limitation of the Wilderness System to areas designated as "wilderness" or "primitive" in September, 1964. The Secretary of Agriculture is not authorized to review or recommend for wilderness designation national forest areas outside Primitive Areas, with the sole exception that in section 3(b) of the Wilderness Act the Secretary is given discretion to review and recommend to the President areas

"predominantly of wilderness value" which are "contiguous" to an existing Primitive Area.

Nothing in the above-quoted sentence or in the legislative history of the Wilderness Act supports the judicial creation of a third category of land, of unknown dimension, as to which the Secretary of Agriculture is precluded from exercising his management responsibilities under the Multiple Use Act. Yet that is precisely what the courts below did.

The very care and precision with which the Congress spelled out the areas to which the Wilderness Act applied, and the procedures by which wilderness areas were to be created and administered, militates against any such open-ended and amorphous expansion of the congressional intent.

What are the consequences of converting this "Nothing herein contained" clause into an affirmative mandate? They cannot all be foreseen, but some problems are already clear:

(a) Under the court's injunction the Secretary of Agriculture cannot honor his contract with Kaibab Industries (which relates to a portion of the area not contiguous to the Primitive Area), or establish trail head facilities for campers and hikers in the East Meadow Creek area, or exercise any of his responsibilities under the Multiple Use Act, until both the President *and* the Congress have determined that the area is not to be frozen into the Wilderness System.

(b) How does Congress determine that an area should *not* be designated as wilderness? Definitive action on a Presidential recommendation that might have included

but did not include, such acreage may be one way. Yet suppose no Presidential recommendation is made that a new wilderness area be created in that vicinity? And how long a period must pass after a Presidential recommendation has been submitted before Congress may be deemed to have rejected it? Numerous wilderness proposals recommended by the President in March, 1968, have yet to be acted upon by Congress. Are all areas contiguous to Primitive Areas frozen from multiple use for a period of such indefinite duration?[2] And how far from Primitive Areas do "contiguous" areas run?

(c) The courts below threw into conflict provisions of the Multiple Use and Wilderness Acts which Congress intended be read together and harmonized. There is no principle of statutory interpretation which can justify rewriting congressional intent from an allowance of discretion to recommend boundary alterations into a mandatory directive of formal wilderness review.

(d) If a sentence beginning "Nothing herein contained shall limit the President in proposing" can be judicially converted into a mandate suspending applicable laws until the President proposes and Congress reaches a final decision, it is impossible to tell what statutory mandates may have been unwittingly created in entirely unrelated fields of law.

(e) The effect of the decision is to extend mandatory wilderness review and recommendation procedures from about 5.5 million acres of existing Primitive Areas to

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[2]The injunctive order of the district court herein says it shall continue "indefinitely or until a determination has been made by the President and Congress."

additional millions of acres of "contiguous" lands, the full scope of such extension depending upon how far "contiguous" lands may reach. The Forest Service estimates there are *over 4.75 million acres* of such lands; an estimate by respondents would be indeterminately greater. It is not the province of the courts thus to reallocate the efforts and budget of the Forest Service.[3]

3. In the Multiple Use Act, the Congress charged the Forest Service with responsibility for the administration of the national forests. The decisions below substitute the judgment of the courts for that of the expert agency. If permitted to stand as a precedent, the decision can only lead to undue burdens on the Federal judicial system.

There is nothing in the record to show that the evidence adduced by respondents at the trial was any different from that already urged upon and carefully considered by the Forest Service. There was no finding that the Forest Service had acted arbitrarily or capriciously, had considered things it should not have considered, or had failed to consider things it should have considered. Respondents simply disagreed with the conclusions of the Forest Service that the East Meadow Creek area was not

[3]This is not to say that the *Secretary* does not have authority to make findings that contiguous areas are predominantly of wilderness value and refer them to the President for his recommendations to the Congress for additions to the Wilderness System. Section 2321(1) of the Forest Service Manual reflects that agency authority. And the authority is exercised by the Forest Service to recommend appropriate wilderness additions. The 1970 proposal of the Forest Service for the Eagle's Nest Wilderness, for example, suggests the addition of a substantial acreage contiguous to the Primitive Area as it existed in 1964. But it is for the Secretary, not the courts, to make the findings. The Forest Service found that the East Meadow Creek area is more suitable for multiple use purposes than for addition to the Wilderness System. As will be discussed below, there is no justification in this case for the district court to have substituted its own contrary finding.

"predominantly of wilderness value" and that it should remain in multiple use management.

The evidence showed that the Forest Service had meticulously studied and reported on the East Meadow Creek area and the White River National Forest of which it is a part.[4] D. S. Nordwall, Regional Forester, and G. Weidenhoff, Branch Chief Wilderness Studies, testified to the Forest Service decision and the reasons for it.[5] The Forest Service studies thoroughly evaluated the East Meadow Creek area for outdoor recreation, range, timber, watershed and wildlife and fish purposes, in accordance with multiple use management standards, and specifically considered the potential of the area for wilderness recommendation.

Among the factors which supported the Forest Service conclusion that the area was not suitable for recommendation to the President for possible wilderness classification were the following:

1. The East Meadow Creek area was more suited to camp and related recreation purposes, and as a trail head for the Primitive Area, than for wilderness purposes; the Forest Service "considered very carefully the need for expanded recreation in the area";

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[4]Forest Service reports include: General Timber Management Statement: White River National Forest, 1960 (Exh. S-1); Multiple Use Land Management Plan, Eagle Ranger District, 1961-1970 (Exh. S-3); Timber Management Plan, Holy Cross Working Circle, 1962-1972 (Exh. S-4); Multiple Use Management Plan, Eagle Ranger District, March 28, 1966 (Exh. S-6); Sale Area Planning Report, East Meadow Creek Timber Sale, January 19, 1968 (Exh. S-8); Multiple Use Survey Report, East Meadow Creek Timber Sale, May 10, 1968 (Exh. S-7); Timber Sale Report, February 27, 1969 (Exh. S-10).

[5]Appx., pp. 241-242, 246-247, 251-260, 298-301, 305-311, 321-327, 338-344, 390-391, 402-405, 408-415.

there was "very considerable opportunity for developing camp and picnic sites as well as what we would call a trail head or takeoff point into the wilderness"; the construction of a "trail head camp" in the East Meadow Creek area would "facilitate the access of people" and "increase the use" of the Primitive Area (Appx., pp. 251, 308, 333, 340);

2. There was a road in the area, and it was related to other road development plans (Appx., p. 307);

3. Timber harvest would permit development of needed water supplies; the Denver Water Board had made plans for extension of its water system in the area (Appx., pp. 307-309, 335);

4. Privately owned lands, not subject to inclusion in the Wilderness System, lay in an arc around the area (Appx., pp. 307, 309);

5. The area did not have topographical characteristics to afford a natural boundary for a wilderness area (Appx., pp. 405, 415);

6. There were existing mining claims in the area (Appx., pp. 310-311);

7. There was well-known national need—the subject of Presidential statement—for greater supplies of lumber and plywood to avoid "a very definite effect on the cost of housing and home building in the United States" (Appx., pp. 254-255, 328-329, 343-344).[6]

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[6]The nationwide impact of the decision below on allowable cut of national forest timber and on lumber-dependent communities is pointed up in the petition of the United States in No. 71-915 (p. 15).

The Wilderness Studies Branch Chief testified in summary (Appx., p. 402):

> "Is there any chance of East Meadow being included in any subsequent stages of this [the Wilderness Act review of the Primitive Area]? Or is it out?
>
> The Witness: East Meadow Creek in my opinion, Your Honor, did not qualify for inclusion."

The Regional Forester stated in conclusion (Appx., p. 343):

> "Q. Have you formed an opinion as to whether or not the contract area is suitable for wilderness as defined by the Wilderness Act?
>
> A. Yes, I have.
>
> Q. What is that opinion?
>
> A. My opinion is that it is not."

The district court treated the matter as a trial *de novo* between private parties, giving no weight to the governmental studies and determinations, overrode all of the Forest Service findings to the contrary and made its own finding that the area was "sufficiently of wilderness value" to compel the Secretary of Agriculture to undertake a formal wilderness area review and recommendation to the President under section 3(b) of the Wilderness Act.

In affirming the judgment, the court of appeals stated:

> "Appellants do not attack the finding of the trial court, as such, that the East Meadow Creek Area is of wilderness value, and, indeed, the finding is supported by the record considered under any standard of appellate review" (448 F.2d 796).

Having made clear their position on motion for summary judgment and at trial that Forest Service findings

were controlling, petitioners may not be charged with acquiescing in any wilderness finding of the district court, much less in the overstated version advanced by the court below. The court had no right in law to replace the non-wilderness finding of the Forest Service with its own wilderness finding. There was no showing by respondents, and there could not be, that the Forest Service committed any abuse of discretion in its determination that the East Meadow Creek area was *not* "predominantly of wilderness value."[7]

The decision below removes the East Meadow Creek area from multiple use management, perhaps for many years, in total disregard of the amply supported findings of the Forest Service. The decision destroys contract rights of Kaibab Industries. In broader consequence, the decision reduces the supply of lumber available for housing, impairs the administration of the national forests by the Forest

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[7]This Court has just stated in *FPC v. Florida Power & Light* (Jan. 12, 1972) ..... U.S. ....., 1971 CCH S.Ct.Rpts. 667: "Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact" (p. 678); and, quoting with approval from *Chapman v. Federal Power Comm'n* (1953) 345 U.S. 153, 171, the Court added: "'Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it had exercised had no basis in evidence and so was devoid of reason'" (p. 681). The Ninth Circuit Court of Appeals in *McMichael v. United States* (9 Cir. 1965) 355 F.2d 283 has stated with reference to the multiple use management of national forest lands by the Secretary of Agriculture: "The choice of what shall be preserved is an administrative choice in which geographical and topographical considerations are certainly germane but hardly are subject to judicial review" (p. 286).

Service, and improperly plunges the district courts into forest management.

CONCLUSION

This petition for a writ of certiorari should be granted.

Dated: January 31, 1972.

Respectfully submitted,

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(Appendices Follow)

Appendix A

Wilderness Act of 1964 (16 U.S.C. 1131-1136):

§ 1131. National Wilderness Preservation System—Establishment; Congressional declaration of policy; wilderness areas; administration for public use and enjoyment, protection, preservation, and gathering and dissemination of information; provisions for designation as wilderness areas

(a) In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act.

Management of area included in System; appropriations

(b) The inclusion of an area in the National Wilderness Preservation System notwithstanding, the

area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress. No appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness Preservation System as a separate unit nor shall any appropriations be available for additional personnel stated as being required solely for the purpose of managing or administering areas solely because they are included within the National Wilderness Preservation System.

Definition of wilderness

(c) A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. Pub.L. 88-577, § 2, Sept. 3, 1964, 78 Stat. 890.

§ 1132. Extent of System—Designation of wilderness areas; filing of maps and descriptions with congressional committees; correction of errors; public records; availability of records in regional offices

(a) All areas within the national forests classified at least 30 days before September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness", "wild", or "canoe" are hereby designated as wilderness areas. The Secretary of Agriculture shall—

(1) Within one year after September 3, 1964, file a map and legal description of each wilderness area with the Interior and Insular Affairs Committees of the United States Senate and the House of Representatives, and such descriptions shall have the same force and effect as if included in this chapter: *Provided, however,* That correction of clerical and typographical errors in such legal descriptions and maps may be made.

(2) Maintain, available to the public, records pertaining to said wilderness areas, including maps and legal descriptions, copies of regulations governing them, copies of public notices of, and reports submitted to Congress regarding pending additions, eliminations, or modifications. Maps, legal descriptions, and regulations pertaining to wilderness areas within their respective jurisdictions also shall be available to the public in the offices of regional foresters, national forest supervisors, and forest rangers.

Review by Secretary of Agriculture of classifications as primitive areas; Presidential recommendations to Congress; approval of Congress; size of primitive areas; Gore Range Eagles Nest Primitive Area, Colorado

(b) The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. Such advice shall be given with respect to not less than one third of all the areas now classified as "primitive" within three years after September 3, 1964, not less than two thirds within seven years after September 3, 1964, and the remaining areas within ten years after September 3, 1964. Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress. Areas classified as "primitive" on September 3, 1964 shall continue to be administered under the rules and regulations affecting such areas on September 3, 1964 until Congress has determined otherwise. Any such area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit: if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two hundred and eighty acres in

any one compact unit the increase in size shall not become effective until acted upon by Congress. Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. Notwithstanding any other provisions of this chapter, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.

Review by Secretary of Interior of roadless areas of national park system, national wildlife refuges and game ranges; Presidential recommendation to Congress

(c) Within ten years after September 3, 1964 the Secretary of the Interior shall review every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges, under his jurisdiction on September 3, 1964 and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendation with respect to the designation as wilderness of each such area or island on which review has been completed, together with a map thereof and a definition of its boundaries. Such advice shall be given with respect to not less than one-third of the areas and islands to be reviewed

under this subsection within three years after September 3, 1964, not less than two-thirds within seven years of September 3, 1964, and the remainder within ten years of September 3, 1964. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress. Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system.

Conditions precedent to administrative recommendations of suitability of areas for preservation as wilderness: publication in Federal Register; public hearings; views of State, county, and Federal officials, submission of views to Congress

(d) (1) The Secretary of Agriculture and the Secretary of the Interior shall, prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness—

(A) give such public notice of the proposed action as they deem appropriate, including publication in the Federal Register and in a newspaper having general circulation in the area or areas in the vicinity of the affected land;

(B) hold a public hearing or hearings at a location or locations convenient to the area affected. The hearings shall be announced through such means as the respective Secretaries involved deem appropriate, including notices in the Federal Register and in newspapers of general circulation in the area: *Provided*, That if the lands involved are located in more than one State, at least one hearing shall be held in each State in which a portion of the land lies;

(C) at least thirty days before the date of a hearing advise the Governor of each State and the governing board of each county, or in Alaska the borough, in which the lands are located, and Federal departments and agencies concerned, and invite such officials and Federal agencies to submit their views on the proposed action at the hearing or by no later than thirty days following the date of the hearing.

(2) Any views submitted to the appropriate Secretary under the provisions of (1) of this subsection with respect to any area shall be included with any recommendations to the President and to Congress with respect to such area.

Modification or adjustment of boundaries; public notice and hearings; administrative and executive recommendations to Congress; approval of Congress

(c) Any modification or adjustment of boundaries of any wilderness area shall be recommended by the appropriate Secretary after public notice of such proposal and public hearing or hearings as provided in subsection (d) of this section. The proposed modification or adjustment shall then be recommended with map and description thereof to the President. The President shall advise the United States Senate and the House of Representatives of his recommendations with respect to such modification or adjustment and such recommendations shall become effective only in the same manner as provided for in subsections (b) and (c) of this section. Pub.L. 88-577, § 3, Sept. 3, 1964, 78 Stat. 891.

§ 1133. Use of wilderness areas—Purposes of national forests, national park system, and national wildlife refuge system; other provisions applicable to national forests, Superior National Forest, and national park system

(a) The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and

(1) Nothing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple Use Sustained Yield Act of June 12, 1960 (74 Stat. 215).

(2) Nothing in this chapter shall modify the restrictions and provisions of the Shipstead Nolan Act (Public Law 539, Seventy-first Congress, July 10, 1930; 46 Stat. 1020), the Thye-Blatnik Act (Public Law 733, Eightieth Congress, June 22, 1948; 62 Stat. 568), and the Humphrey-Thye-Blatnik-Andresen Act (Public Law 607, Eighty-fourth Congress, June 22, 1956; 70 Stat. 326), as applying to the Superior National Forest or the regulations of the Secretary of Agriculture.

(3) Nothing in this chapter shall modify the statutory authority under which units of the national park system are created. Further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant to this chapter shall in no manner lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system in accordance with sections

1 and 2-4 of this title, the statutory authority under which the area was created, or any other Act of Congress which might pertain to or affect such area, including, but not limited to, the Act of June 8, 1906 (34 Stat. 225); section 796 (2) of this title; and the Act of August 21, 1935 (49 Stat. 666).

Agency responsibility for preservation and administration to preserve wilderness character; public purposes of wilderness areas

(b) Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

Prohibition provisions: commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations; exceptions: area administration and personal health and safety emergencies

(c) Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no

other form of mechanical transport, and no structure or installation within any such area.

Special provisions

(d) The following special provisions are hereby made:

Aircraft or motorboats; fire, insects, and diseases

(1) Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.

Mineral activities, surveys for mineral value

(2) Nothing in this chapter shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. Furthermore, in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress.

Mining and mineral leasing laws; leases, permits, and licenses; withdrawal of minerals from appropriation and disposition

(3) Notwithstanding any other provisions of this chapter, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, water-lines, telephone lines, or facilities necessary in exploring, drilling, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations lying within the boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this chapter as wilderness areas shall convey title to the mineral deposits within the claim, together with the right to cut and use so much of the mature timber therefrom as may be needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available, and if the timber is cut under sound

principles of forest management as defined by the national forest rules and regulations, but each such patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this chapter: *Provided*, That, unless hereafter specifically authorized, no patent within wilderness areas designated by this chapter shall issue after December 31, 1983, except for the valid claims existing on or before December 31, 1983. Mining claims located after September 3, 1964 within the boundaries of wilderness areas designated by this chapter shall create no rights in excess of those rights which may be patented under the provisions of this subsection. Mineral leases, permits, and licenses covering lands within national forest wilderness areas designated by this chapter shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed. Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

Water resources, reservoirs, and other facilities; grazing

(4) Within wilderness areas in the national forests designated by this chapter, (1) the President may, within a specific area and in accordance with

such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial; and (2) the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.

Management of Boundary Waters Canoe Area, Superior National Forest, Minnesota; motorboats

(5) Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams and portages: *Provided*, That nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats.

Commercial services

(6) Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper

for realizing the recreational or other wilderness purposes of the areas.

State water laws exemption

(7) Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

State jurisdiction of wildlife and fish in national forests

(8) Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests. Pub. L. 88-577, § 4, Sept. 3, 1964, 78 Stat. 893.

§ 1134. State and private lands within wilderness areas—Access; exchange of lands; mineral interests restriction

(a) In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: *Provided, however*, That the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.

Customary means for ingress and egress to wilderness areas subject to mining claims or other occupancies

(b) In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

Acquisition of lands

(c) Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this chapter as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress. Pub.L. 88-577, § 5, Sept. 3, 1964, 78 Stat. 896.

§ 1135. Gifts, bequests, and contributions

(a) The Secretary of Agriculture may accept gifts or bequests of land within wilderness areas designated by this chapter for preservation as wilderness. The Secretary of Agriculture may also accept gifts or bequests of land adjacent to wilderness areas designated by this chapter for preservation as wilderness if he has given sixty days advance notice thereof to the President of the Senate and the Speaker of the House of Representatives. Land accepted by the Secretary of Agriculture under this section shall become part of the wilderness area involved. Regulations with regard to any such land may be in accordance with such agreements, consistent with the policy of this chapter, as are made at the time of such gift or such

conditions, consistent with such policy, as may be included in, and accepted with, such bequest.

(b) The Secretary of Agriculture or the Secretary of the Interior is authorized to accept private contributions and gifts to be used to further the purposes of this chapter. Pub.L. 88-577, § 6, Sept. 3, 1964, 78 Stat. 896.

§ 1136. Annual reports to Congress

At the opening of each session of Congress, the Secretaries of Agriculture and Interior shall jointly report to the President for transmission to Congress on the status of the wilderness system, including a list and descriptions of the areas in the system, regulations in effect, and other pertinent information, together with any recommendations they may care to make. Pub.L. 88-577, § 7, Sept. 3, 1964, 78 Stat. 896.

Multiple Use—Sustained Yield Act of 1960 (16 U.S.C. 528-531):

§ 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services—Congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528-531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be con-

strued so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests. Pub.L. 86-517, § 1, June 12, 1960, 74 Stat. 215.

§ 529. Same; authorization; consideration to relative values of resources; areas of wilderness

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528-531 of this title. Pub.L. 86-517, § 2, June 12, 1960, 74 Stat. 215.

§ 530. Same; cooperation with State and local governmental agencies and others

In the effectuation of sections 528-531 of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests. Pub.L. 86-517, § 3, June 12, 1960, 74 Stat. 215.

§ 531. Same; definitions

As used in section 528-531 of this title, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the

combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land. Pub.L. 86-517, § 4, June 12, 1960, 74 Stat. 215.

Act of June 4, 1897 (16 U.S.C. 475-476):

§ 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and

protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. June 4, 1897, c. 2, § 4, 30 Stat. 34.

§ 476. Sale of timber

For the purpose of preserving the living and growing timber and promoting the younger growth on national forests, the Secretary of Agriculture, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such national forests as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place notice thereof shall be given by the said Secretary of Agriculture for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists. In cases of unusual emergency the Secretary of Agriculture may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale. He may, in his discretion, sell without advertise-

ment, in quantities to suit applicants, at a fair appraisement, timber and cord wood and other forest products not exceeding $2,000 in appraised value. In cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of Agriculture, at not less than the appraised valuation, in quantities to suit purchasers. Payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of Agriculture may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Secretary of Agriculture, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of Agriculture not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Secretary of Agriculture and to the receiver in the land office in which such reservation shall be located of his doings in the premises. June 4, 1897, c. 2, § 1, 30 Stat. 35; June 6, 1900, c. 804, 31 Stat. 661; Feb. 1, 1905, c. 288, § 1, 33 Stat. 628; June 30, 1906, c. 3913, 34 Stat. 684; Mar. 3, 1925, c. 457, § 3, 43 Stat. 1132; May 27, 1952, c. 337, 66 Stat. 95.

Appendix B

Parker v. United States
Cite as 448 F.2d 793 (1971)

United States Court of Appeals
Tenth Circuit

Nos. 404-70 to 406-70

ROBERT W. PARKER et al., Appellees

v.

UNITED STATES OF AMERICA et al., and WESTERN WOOD PRODUCTS ASSOCIATION, Intervenor, Appellants

Oct. 1, 1971.

Before LEWIS, Chief Judge, and PICKETT and ADAMS*, Circuit Judges.

LEWIS, Chief Judge.

This appeal is taken by the United States, the Secretary of Agriculture, certain named subordinate federal officials, an intervenor, and Kaibab Industries, a lumber company, from a judgment of the District Court for the District

*Of the Third Circuit, sitting by designation.

of Colorado, 309 F.Supp. 593, enjoining the federal appellants and their contractor, Kaibab, from performing a contract of sale and harvest of designated timber located on public lands in the state of Colorado. The subject lands adjoin but are not contained within the bounds of a designated primitive or wilderness area and thus the case presents issues of first impression requiring interpretation of the Wilderness Act of September 3, 1964, 78 Stat. 890 and particularly section 3(b) of the Act, 16 U.S.C. § 1132 (b) which provides:

> The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. * * * *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.* Notwithstanding any other provisions of this chapter, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest. (Emphasis added.)

The judgment of the district court has multiple effects: (1) It determines as a fact that the timber contract pertains to an area, the East Meadow Creek Area of White River National Forest, that is predominantly of wilderness value and contiguous to the Gore Range-Eagles Nest Primitive Area; (2) it enjoins the sale and harvest of timber in the East Meadow Creek Area of White River National Forest until a determination is made by the President and Congress regarding the area's inclusion in a wilderness area to be created from the Gore Range-Eagles Nest Primitive Area and suitable contiguous lands; (3) it requires that the East Meadow Creek Area, because of its wilderness character and contiguousness to the Gore Range-Eagles Nest Primitive Area, be included in the wilderness study report of the Secretary of Agriculture to the President and Congress. The memorandum opinion of the trial court is found at 309 F.Supp. 593. Appellants contend the judgment must fail for lack of jurisdiction, characterizing the injunction as an unauthorized interference with a discretionary management function authorized by Congress and stemming from an unconsented suit against the United States. Kaibab and interested lumber interests add the contention that appellees have failed to exhaust their administrative remedies.

The cases defining and interpreting the extent and limitations on judicial review of administrative decisions are inultitudinous but have recently been brought into proper perspective with remarkable clarity by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136. We there learn that administrative decisions (such as the one here considered are subject to judicial review under the Admin-

istrative Procedure Act, 5 U.S.C. § 701, unless specifically prohibited by the Congress or falling within the "narrow exception" of agency action committed to the wide discretion of the administrative body by law as evidenced by clear congressional intent. Citizens to Preserve Overton Park, *supra* at 410, 91 S.Ct. 814. This "wide" discretion within the agency is never judicially unapproachable when there is "law to apply." *Id.* at 410, 91 S.Ct. 814.

We have no difficulty in recognizing the general purpose of the Wilderness Act. It is simply a congressional acknowledgment of the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty inroads of man, usually commercial in nature, and the enactment of a "proceed slowly" order until it can be determined wherein the balance between proper multiple uses of the wilderness lies and the most desirable and highest use established for the present and future. A concerned Congress, reflecting the wishes of a concerned public, did by statutory definition choose terminology that would seem to indicate its ultimate mandate.

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and

unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c).

Having initially established by definition that a wilderness cannot remain a wilderness if man invades and remains, the Act made at least three further provisions pertinent to our case. It designated the Gore Range-Eagles Nest Primitive Area, and other comparable areas, a preserved wilderness subject to some exceptions not here involved. It required the Secretary of Agriculture, through 16 U.S.C. § 1132(b), to review and report as findings to the President, and within a time certain, the suitability or nonsuitability of all such areas for preservation as wilderness within the national forests. In turn, the President was directed to advise the Congress of his recommendations on the subject *but*, as earlier emphasized in our citation of this section, the President was not to be bound by the action of the Secretary or findings of the Secretary and could recommend that the designated primitive areas be enlarged by the addition of contiguous areas predominantly of wilderness value.

Appellants do not attack the finding of the trial court, as such, that the East Meadow Creek Area is of wilderness value. And, indeed, the finding is supported by the record considered under any standard of appellate review. *See* 309 F.Supp. 593, 601. But of course such finding has no significance unless there is "law to apply," in that 16 U.S.C. § 1132(b) clearly means that the President and

Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation. The lumber industry appellants do attack the trial court's designation of the contract lands as "contiguous" to the preserved wilderness area by pointing out that the Forest Service, after listening to various protests concerning the original contract contemplated with Kaibab, reduced the number of board feet in the proposed contract and in so doing preserved a bumper area between East Meadow Creek and the Gore Range-Eagles Nest Primitive Area. We are not impressed with this contention. The preservation of a "bumper" area does not probe the basic question presented, merely serves to lessen the impact of the agency action, and does not justify such action if otherwise prohibited. We reject this contention as dispositive of our issue.

Because this case is one of first impression, all appellants very properly set out the legislative history of the Wilderness Act as an argumentative premise that the Act was not intended to constitute a drastic cutback in the discretionary management judgment of the concerned administrative agencies and that the Act was intended to supplement and not supplant the Multiple Use-Sustained Yield Act of June 12, 1960, 16 U.S.C. § 528, et seq. And, indeed, the legislative history of the Act does reflect constant reassurance to lumber, grazing, and other such interests by many informed members of Congress that the legislation does not and cannot adversely affect their legitimate interests. However, these portions of the legislative history would appear to be directed to those provisions of the Act which locked in the statutory

designated wilderness areas for a time, in most instances certain, and which were already unavailable for commercial development under existing administrative policy and rulings. Since the Act only accepted as wilderness those areas then designated and did not extend the designation, wilderness remained unaffected by the statute and any concern of commercial interests in that regard was not warranted. We accept the legislative history of the Act as indicating reassurance of current administrative policy regarding existing wilderness areas and reassurance to commercial interests that no change was contemplated to their then existing potentials. So, too, we accept the legislative history of the Act as indicating its terms should not be interpreted as a general curtailment of agency discretion in the normal day-by-day administration of the national forests, parks or other public lands. But we find nothing in the Wilderness Act as written or in its legislative history in formulation that would support an ambiguity in word or intent dictating an error in the interpretation of section 1132(b) as made by the trial court.

It is, of course, a cardinal rule of statutory construction that effect should be given to every provision of a statute, Salt Lake County v. Utah Copper Co., 10 Cir., 93 F.2d 127, 133. Should we, in the case at bar, concede to federal appellants the discretionary right to destroy the wilderness value of the subject area, one contiguous to a designated wilderness, we would render meaningless the clear intent of Congress expressed in 16 U.S.C. § 1132(b) that both the President and the Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas

for final wilderness designation. This statutory limitation on agency discretion is, of course, a narrow one dictated by necessity as contained in the definition of wilderness and by the specifics of the statutory words creating the limitation.

The third and final aspect of the trial court's injunction affirmatively requires the federal appellants to include its study of the East Meadow Creek Area in its report to the President and Congress. Justification for this requirement is found in the regulations of the Forest Service itself.

The Forest Service, rather than include its detailed regulations in the Code of Federal Regulations, maintains the Forest Service Manual (FSM). The section of the regulations which is most helpful in the construction of 16 U.S.C. § 1132(b) is FSM § 2321(4):

> Each Primitive Area (so classified as of September 3, 1964) *and contiguous lands which seem to have significant wilderness resources* will be studied to determine whether to recommend that all or part should be included in the National Wilderness Preservation System. (Emphasis added.)

Following FSM § 2321(4) are lengthy and detailed directives describing the manner in which studies are to be made, listing the factors to be considered in making recommendations, giving instructions for conducting public hearings, and recognizing that the duty of the Forest Service is to study and recommend and that the President and Congress are to make the final determinations. The regulations contain not just one, but many references to the study of contiguous areas of significant wilderness value. It seems clear from the Forest Service's regulations that its construction of the Wilderness Act

is in full accord with the decision of the court below. Indeed, the testimony and exhibits offered at trial show that the Forest Service has scrupulously adhered to the regulations and the statutory scheme in other wilderness reviews and recommendations. A review of the exhibits offered at trial shows numerous recommendations for addition of contiguous areas to the primitive areas for final wilderness classification.

The trial court, having determined as a fact that the East Meadow Creek Area had predominantly wilderness value which should be preserved for consideration at the executive and congressional level, was completely justified in directing inclusion of a study of the area in the mandated report to the President. This requirement in no way directs or limits the Secretary in his full discretionary right to make such recommendation to the President as he may deem proper.

We conclude, as did the trial court, that 16 U.S.C. § 1132(b) sets out "law to apply" under the facts of the case at bar and hold that consequently this action and the judgment neither constitute an unauthorized suit against the United States nor an unjustified judicial interference with the management powers of federal appellants.

As earlier indicated, the lumber industry appellants (but not federal appellants) assert that appellate review in the case should be rejected because appellees failed to exhaust administrative remedies before instituting the action. The decision to contract with Kaibab to harvest the East Meadow Creek Area was made by the Regional Forester. Applicable regulations provide for an administrative appeal from such decisions to the Chief of the

Forest Service. From the decision of the Chief an appeal is available to the Secretary of Agriculture. 36 C.F.R. 211.20 et seq. It is undisputed that the plaintiffs did not pursue their right of appeal through the prescribed administrative process.

The issue of exhaustion of administrative remedies is raised for the first time on appeal and should therefore be given no consideration by this court, Stephens Industries, Inc. v. Haskins & Sells, 10 Cir., 438 F.2d 357, unless favorable consideration of the issue defeats jurisdiction. Seidenbach's v. Bland Terry Shoe Corp., 10 Cir., 292 F.2d 206, cert. denied, 368 U.S. 933, 82 S.Ct. 365, 7 L.Ed.2d 194. We can conceive of no legal nor logical reason why the doctrine of exhaustion of administrative remedies should be applied in this case at this late date. The reasons are many and manifest: There is no legislative mandate requiring such exhaustion; the dispositive issue is one of pure law requiring no application of administrative expertise, *see* Skinner & Eddy Corp. v. United States, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772; Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784; the desirability of saving judicial time through insistence on administrative exhaustion is no longer applicable and would now amount to a mockery; the record clearly reflects that the administrative decision was informally considered through all levels of the appropriate agencies; the doctrine is applied for the benefit of orderly procedure in the administrative and judicial process and not for the benefit of third parties.

The judgment is affirmed.

United States District Court
D. Colorado

Civ. A. No. C-1368

ROBERT W. PARKER et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, CLIFFORD HARDIN, individually and as Secretary of Agriculture of the United States, EDWARD P. CLIFF, individually and as Chief, United States Forest Service, DAVID S. NORDWALL, individually and as Regional Forester, JAMES O. FOLKESTAD, individually and as Supervisor, White River National Forest, United States Department of Agriculture and KAIBAB INDUSTRIES, an Arizona Corporation,

Defendants.

Feb. 27, 1970.

MEMORANDUM OPINION AND ORDER

WILLIAM E. DOYLE, District Judge.

This is a suit in which the plaintiffs seek to enjoin the defendants Secretary of Agriculture and the United States Forest Service from selling to the defendant Kaibab Industries 4.3 million board feet of Englemann Spruce, Lodgepole Pine and fir, which the defendant Kaibab proposes to cut and purchase from the United

States. The sale area is in East Meadow Creek, which is part of the White River National Forest near Vail, Colorado. The plaintiffs are either residents and property owners at Vail, Colorado, or conservation organizations. The plaintiffs assert that the East Meadow Creek area within which the Forest Service and Kaibab Industries propose to harvest the 4.3 million board feet of Englemann Spruce, Lodgepole Pine and fir is of such character as to qualify as wilderness under the 1964 Wilderness Act, 16 U.S.C. § 1131 et seq. Plaintiffs further allege that the decision of the defendants to sell the timber violates the letter and the spirit of the Wilderness Act together with the Forest Service's own regulations.

In essence the claim is that East Meadow Creek, which includes the proposed sale area, is contiguous to the Gore Range-Eagles Nest Primitive Region and that its character is substantially wilderness. Plaintiffs further assert that the defendants have not studied the area; that the Act and Forest Service regulations contemplate that there shall be a study; that the President and Congress shall have an opportunity to consider a contiguous area of the character of the present one for inclusion in an existing wilderness or primitive area; that the sale of the 4.3 million board feet plus the building of the necessary access roads and the harvesting and removal of the timber would irreparably destroy the wilderness character of this area.

This cause has been before the Court on the defendants' motion for summary judgment, 307 F.Supp. 685. This motion was denied and on that occasion we held that

1. There was jurisdiction over the subject matter;

2. Plaintiffs have standing to bring the suit;

3. The doctrine of sovereign immunity does not bar the action;

4. Plaintiffs should have an opportunity to present evidence as to the wilderness qualities of East Meadow Creek and their ecological interrelationship with the contiguous Gore Range-Eagles Nest Primitive Region.

Pursuant to this ruling a trial to the Court was had. Considerable evidence concerning the nature of the area has been received and the cause has been submitted for a decision. We are of the opinion that formal findings of fact and conclusions of law are unnecessary since the basis of our holding herein is primarily a matter of law. Necessary findings of fact will be set forth in narrative form.

The Gore Range-Eagles Nest Primitive Area has been classified as such by the Forest Service since June 19, 1931, long prior to the adoption by Congress of the Wilderness Act. It is located about 90 miles west of Denver within the Arapahoe and White River National Forests and has a total area of about 61,000 acres. Included within it is about 30 miles of the so-called Gore Range of mountains, which is regarded as one of the most inaccessible ranges within the State of Colorado. Mt. Powell, having an elevation of 13,534 feet, is located within the area, and there are said to be approximately 17 other peaks with elevations in excess of 13,000 feet. The elevations range from 8,500 feet to 13,500 feet, and the greater part of this region is classified as alpine. The East Meadow area is

said to be sub-alpine. There are major streams and large lakes in the Gore area and a good many deer, elk, mountain sheep and small animals. There are no improvements other than a few abandoned cabins and temporary corrals. There are, however, extensive foot and horse trails maintained by the Forest Service.

East Meadow Creek area is, as we have indicated, contiguous to the Gore Primitive Region on the west. It consists of timbered valleys surrounded by timbered ridges. Within it are several parks, small grassy open areas from one acre to fifty acres surrounded by trees. On the average, the elevation of the East Meadow Creek region is about 10,000 feet, which is somewhat lower than the contiguous primitive area. It is located in what is known as the sub-alpine life zone. It is situated so that it may be used as an access route into the Gore Primitive Area.

The proposed sale area is located within the East Meadow Creek basin, in the Piney Lake Compartment, Eagle River Block, Holy Cross Working Circle, White River National Forest. It consists of some 1,200 acres with an elevation between 9,200 and 10,500 feet. Deer and elk are found in the sale area throughout the summer and fall months and there is light recreation use in the region during the hunting season. The trees in the sale area consist mainly of Englemann Spruce and Lodgepole Pine, some of which are as much as 350 years old, and fir, the age of which ranges up to 120 years.

The East Meadow Creek region is generally untrammeled by man except for an access road which runs to a point about three-fourths of a mile inside the sale area.

There is also a road known as the "bug road" which was constructed during the bark beetle control project in the early 1950's. This road is now blocked off and cannot be used by motorized vehicles. In some places the vegetation has camouflaged the "bug road" so that it is substantially unnoticeable. There are trails in the area.

The Denver Water Board is surveying, looking to possible use of the Meadow Creek drainage in connection with a water diversion project. There is also a possibility that a dam may be built at Piney Lake. These, however, are apparently in the early planning stages, and no definite decisions to undertake the projects have yet been made.

Substantial evidence has been presented as to the character of East Meadow Creek. The witnesses for plaintiff have testified that it is wild in that it is inhabited by animals, is thickly wooded, secluded and unspoiled. Witnesses who are familiar with wilderness say that a wilderness experience can be obtained in this area and that it is fairly accessible. They have also testified that this is an important tourist attraction which is a great source of value to Vail and which brings enjoyment to the tourists who visit it during the spring, summer and fall of each year.

Defendants' evidence does not create any serious dispute concerning the essential character of this area. Rather, they contend that their access road of itself prevents East Meadow from being classified as either primitive or wilderness, and that mining claims plus Denver Water Board surveys plus their own positive plans for

the area make it more suitable for timber harvesting than for wilderness use.

It is crystal clear from the evidence that the consummation of the present sale will effectively take all of East Meadow Creek out of contention as a primitive or wilderness addition.

The original decision to harvest timber in the East Meadow Creek sale area was made sometime in the late 1950's or early 1960's, prior to the adoption of the Wilderness Act. The road was planned prior to the Act and was completed in 1965. As of that time the Forest Service was committed to a sale of the timber. It looked to the sale to pay for the road and its extensions. A multiple use survey report on the proposed contract area was issued in 1967 and a sale area planning report was approved in 1968. The timber involved in the sale constitutes approximately 4.3 million board feet. About four miles of additional haul road, as well as most secondary and spur logging roads, would be, under the contract, constructed by the purchaser.

Throughout the 1960's, and even after the passage of the Wilderness Act, 16 U.S.C. § 1131 et seq., in 1964, the Forest Service considered the East Meadow Creek area as being governed solely by the Multiple Use Act, 16 U.S.C. § 528 et seq. The Wilderness Act was felt to be inapplicable because of the road which had been constructed in the sale area and also because of the plans of the Denver Water Board. On October 4, 1967, the Wilderness Workshop of the Colorado Open Space Coordinating Council submitted a "Citizens' Preliminary Recommendation for

the Establishment of the Eagles Nest Wilderness (Gore Range-Eagles Nest Primitive Area) of Approximately 111,000 Acres," which proposal suggested that a large portion of the area contiguous to the Gore Primitive Region be classified as wilderness. This included much of East Meadow Creek, but excluded the East Meadow Creek Road (*see* map, Appendix I). On February 13, 1969, the Eagles Nest Wilderness Committee submitted a revision of the October 4, 1967 report. This revision recommended that East Meadow Creek be included as wilderness, but excluded both the East Meadow Creek Road and Piney Lake (*see* map, Appendix II). The Forest Service was unmoved by these proposals, making clear to the plaintiffs that East Meadow Creek would not be included in the study and report to the President and Congress on the Gore Primitive Area and that the proposed sale and harvesting of timber would proceed as planned. The plaintiffs then instituted the present suit.

The question presented is a limited and novel one. We are concerned not with whether the Secretary erred on his factual findings in ruling East Meadow Creek out as wilderness, but rather with whether there is sufficient evidence of its wilderness character so as to require study and submission to the President and Congress for determination of its character and whether acts which would change its character should be enjoined until the determination can be made.

The concept of preserving certain public lands in their natural state did not originate in the Wilderness Act. For many years primitive, wilderness and wild areas have

been set aside by the Secretary of Agriculture and the Chief of the Forest Service.[1] Under the Multiple Use-Sustained Yield Act, 16 U.S.C. § 529, this authority of the Secretary of Agriculture to preserve wilderness was specifically recognized.[2] However, prior to the Wilderness Act, the issue of what areas should be designated as wilderness, wild or primitive, and what uses might be made of such areas was entirely within the discretion of the Secretary of Agriculture and the Forest Service. Thus, the administrative decisions with respect to the suitability of an area for wild, wilderness or primitive classification, the need for preserving the natural state of such an area, and the relative values of various resources in the particular area were final and unreviewable. One of the major purposes of the Wilderness Act was to remove a great deal of this absolute discretion from the Secretary of Agriculture and the Forest Service by placing the ultimate responsibility for wilderness classification in Con-

---

[1] In 1929, the Secretary of Agriculture established procedures for designation of primitive areas in national forests. This was superseded in 1939 by regulations establishing procedures for designation of wilderness and wild areas. 36 C.F.R. 251.20-.21 (1967). Wilderness areas had to be in excess of 100,000 acres and could only be designated by the Secretary of Agriculture. Wild areas consisted of between 5,000 and 100,000 acres and could be designated by the Chief of the Forest Service. H.R.Rep.No. 1538 on the Wilderness Act, 2 U.S.Code Cong. & Adm.News pp. 3615, 3616 (1964).

[2] The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. * * * The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528-531 of this title. 16 U.S.C. § 529.

gress. The House Report on the Wilderness Act recognizes this as the primary purpose for the Act:

> A statutory framework for the preservation of wilderness would permit long-range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited.
>
> The committee accordingly endorses the concept of a legislatively authorized wilderness preservation system. Furthermore, by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution to exercise jurisdiction over the public lands. H.R.Rep.No.1538 on the Wilderness Act, 2 U.S.Code Cong. & Adm.News at, pp. 3616–17 (1964).

Congress has defined wilderness as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use

in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c).

We are called upon in this case to determine whether under the evidence presented there is a basis for determination by the President and Congress that the area in question is wilderness within the above definition. It is obvious, of course, that the area here involved does not encompass 5,000 acres. At the same time it is, as noted, contiguous to the Gore Range Wilderness Area which has been classified as such, and it is contended that the President and Congress should determine whether this contiguous area should be included.

See 16 U.S.C. § 1132(b) which provides as follows:

> The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed together with maps and a definition of boundaries. * * * *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.* (Emphasis added.)

With respect to primitive areas, this provision of the Act quite clearly reserves the decision to classify as wilderness to the President and ultimately Congress. The duty of the Secretary of Agriculture is to study and recommend, and this duty is mandatory.

East Meadow Creek, however, is not classified as a primitive region, but rather is *contiguous* to the Gore Primitive Area. With respect to such contiguous areas, the Act is less specific as to the division of responsibility between the Forest Service and Secretary of Agriculture on the one hand and the President and Congress on the other. Nevertheless, the last sentence of 16 U.S.C. § 1132 (b) leaves no doubt that at least as to those contiguous areas which are predominantly of wilderness value, the decision to classify or not to classify them as wilderness *must remain open through the Presidential level.*

It follows from the above that

1. The Wilderness Act, § 1132(b), empowers the President to recommend to the Congress the addition of contiguous primitive area of national forest lands predominantly of wilderness value.

2. The Act contemplates that the President shall be in a position to exercise a meaningful decision with respect to contiguous areas.

3. The Act contemplates that the Secretary shall consider whether a contiguous area is to be included and that its determination is subject to review by the President and ultimately the Congress.

4. Where as here the contiguous area is shown by the evidence to have wilderness character, it thwarts the pur-

pose and spirit of the Act to allow the Forest Service to take abortive action which effectively prevents a Presidential and Congressional decision.[3]

These basic rules which we have outlined above are fully supported by the regulations set forth in the Forest Service Manual.[4] These regulations are designed to aid Forest Service personnel in carrying out their duties under the Wilderness Act.

Forest Service regulation 2321(1) provides that:

> Each Primitive Area (so classified as of September 3, 1964) *and contiguous lands which seem to have significant wilderness resources* will be studied to determine whether to recommend that all or part should be included in the National Wilderness Preservation System. (Emphasis added.)

This regulation is basically a definition of the duties imposed upon the Forest Service by § 1132(b) of the Wilderness Act. It requires that the Forest Service study "contiguous lands which seem to have significant Wilderness resources," and thus supports this Court's conclusion that the duties of the Forest Service under the Wilderness Act are not limited to merely studying the primitive areas.

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[3]We are fully aware of the provision in 16 U.S.C. § 1132(b) which states, "Areas classified on September 3, 1964 shall continue to be administered under the rules and regulations affecting such areas on September 3, 1964 until Congress has determined otherwise." Although this provision does vest some discretion in the Forest Service prior to the ultimate Congressional decision, we do not feel that it can or should be read so as to allow the Forest Service to change the basic character of the area. Such a broad reading of the above provision would allow the Forest Service to frustrate one of the major purposes of the Wilderness Act.

[4]Plaintiffs' Exhibit 1a, b & c.

Of course, not every area which is contiguous to a primitive region need be studied, but rather only those contiguous areas which "seem to have significant Wilderness resources." We consider this latter phrase as referring to contiguous areas which meet the minimum conditions of suitability for wilderness as defined in Forest Service regulation 2321.11(a) (which regulations are, of course, derived from the Act itself):

> 2321.11a *Minimum Conditions.* Most of the area must satisfy, and all of the area must be such that it can be made to satisfy, the definition of Wilderness as set forth in the Wilderness Act.
>
> 1. As an area where the earth and its community of life are untrammeled by man; where man himself is a visitor who does not remain.
>
> 2. As undeveloped land retaining its primeval character and influence, without human habitation or permanent improvements, except those that are necessary to meet the minimum requirements for administration and authorized use of the area.
>
> Generally appearing to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable.
>
> 3. As having outstanding opportunities for solitude or a primitive and unconfined type of recreation.
>
> May also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.
>
> 4. As normally having at least 5,000 acres of land. In rare instances an area may be smaller; but if so, it must be of sufficient size to make practicable its preservation and use in an unimpaired condition.

There are other criteria which must be met by primitive areas and areas contiguous to primitive regions alike before the Forest Service may give a positive recommendation to the President and Congress that the particular area be classified as wilderness. For example, both availability and need must be considered. Forest Service Reg. 2321.1. Undoubtedly, as the Forest Service contends, the questions of availability and need are complex and require substantial expertise in the field of land use management for their resolution. Thus, they must be left largely to the discretion of the Forest Service.

However, we are not here concerned with the issue of whether or not the Forest Service must *recommend* East Meadow Creek for wilderness classification. Nor would we undertake to second guess the Secretary by a ruling that the area in question is wilderness. The only issue presented to this Court is whether the Forest Service must under the Act and its own regulations *study* East Meadow Creek, include that study in its report to the President and Congress, and refrain from acts such as the cutting of timber, which will irrevocably change its character, until the President and Congress have considered the report and rendered a decision. As stated in the Forest Service Manual, the answer to this question does not require a consideration of need or availability, but only a determination as to whether East Meadow Creek seems to possess the inherent qualities of suitability as wilderness.[5] This determination, based as it is on substantially

[5]The Forest Service has recognized this basic difference between the decision to study a particular region and the decision to make a positive recommendation that it be classified as wilderness. For example, in the Forest Service Report on the Flat Tops Wilder-

objective criteria set forth in both the Wilderness Act and Forest Service regulations, is as stated above largely a matter of law. Hence, we are not invading any Forest Service field of expertise. We simply hold that the Forest Service does not have uncontrolled discretion where the area is contiguous to wilderness lands and is shown to be primitive in character; that the determination must be preserved for the President and Congress; that it is not to be preempted. We, therefore, conclude that the issue as to whether a given contiguous area is suitable for wilderness classification, and hence must be studied and included in the Forest Service report to the President and Congress, is a question which is subject to judicial review.

Defendants contend that the East Meadow Creek region was included in a study made pursuant to the Multiple Use-Sustained-Yield Act, 16 U.S.C. § 528 et seq. and was found not qualified for primitive, wild or wilderness classification. Thus, it is claimed that the Forest Service has in effect also fulfilled its duty under the Wilderness Act and any further study of East Meadow Creek would be duplicitous. Again, this argument mistakes the function of the Forest Service with respect to wilderness area under the Wilderness Act as compared with the Multiple Use Act. Under the Multiple Use Act, the authority to classify as wilderness, primitive, or wild was vested solely in the Secretary of Agriculture or the Forest Service, and the decision on these matters was based not only on suit-

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ness, Plaintiffs' Exhibit 8a, several areas contiguous to the Flat Tops Primitive Area which had been suggested by interested groups for classification as wilderness were studied and included in the Forest Service Report, even though the Service ultimately determined not to recommend the areas as wilderness. *See also* Proposal for Mt. Jefferson Wilderness, Plaintiffs' Exhibit 8m.

ability, but also on availability and need. Since the Wilderness Act requires a study and report on those regions contiguous to primitive areas which merely meet the test of suitability, the Forest Service's conclusions under the Multiple Use Act are not conclusive and indeed have little bearing on the question of whether East Meadow Creek must be included in the wilderness study report to the President and Congress.

In applying the criteria of suitability set forth in the Wilderness Act and Forest Service regulations to East Meadow Creek, we find that at least that portion of East Meadow Creek included in the Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness, First Revision, February 13, 1969, seems to have significant wilderness resources[6] and could be determined by the President to be predominantly of wilderness value. Outside of the presence of the East Meadow Creek Road, the area in question is untrammeled by man. The Citizens' Proposal does not include the East Meadow Creek Road, and the testimony indicated that due to the dense forest conditions, this road is substantially unnoticeable from approximately 100 yards away. There was also testimony that East Meadow Creek has outstanding opportunities for solitude and a primitive and unconfined type of recreation, including hunting, hiking, back-packing, and camping. Furthermore, this region is significantly interrelated with the Gore Primitive Area. Not only is it geographically contignous to the Gore, but it also serves as an access route into the primitive area. Although East

[6]The Citizens' Proposal includes a significant portion of the proposed sale area encompassing partial cuts 6 and 12.

Meadow Creek and the Gore Primitive Area are in different life zones due to the differences in altitude, both regions are inhabited by deer and elk, and the testimony indicated a possibility that destruction of the natural state of East Meadow Creek might have an adverse effect on this wildlife. The evidence shows that it is desirable to have both alpine and sub-alpine zones within a wilderness area.

In conclusion, we hold that the East Meadow Creek region meets the minimum requirements of suitability for wilderness classification and must, therefore, be included in the study report to the President and Congress. Furthermore, we find that if the proposed sale and harvesting of timber proceeds, it will frustrate the purpose of the Wilderness Act to vest the ultimate decision as to wilderness classification in the President and Congress, rather than the Forest Service and Secretary of Agriculture. The Forest Service has been considering the proposed sale of timber in East Meadow Creek for several years. The decision to sell and harvest having now been made, the Service claims that the plans must proceed immediately. We must disagree. The interests of the plaintiffs and the public in maintaining the status quo until the requirements of the Act have been fulfilled far outweigh this desire to get the job done now—after more than ten years of delay.

We are not unmindful of the interests and equities of Kaibab Industries, but here again we cannot give effect to this interest, for the cutting of the trees, is as we have noted, too final and conclusive. It must await the processes of law.

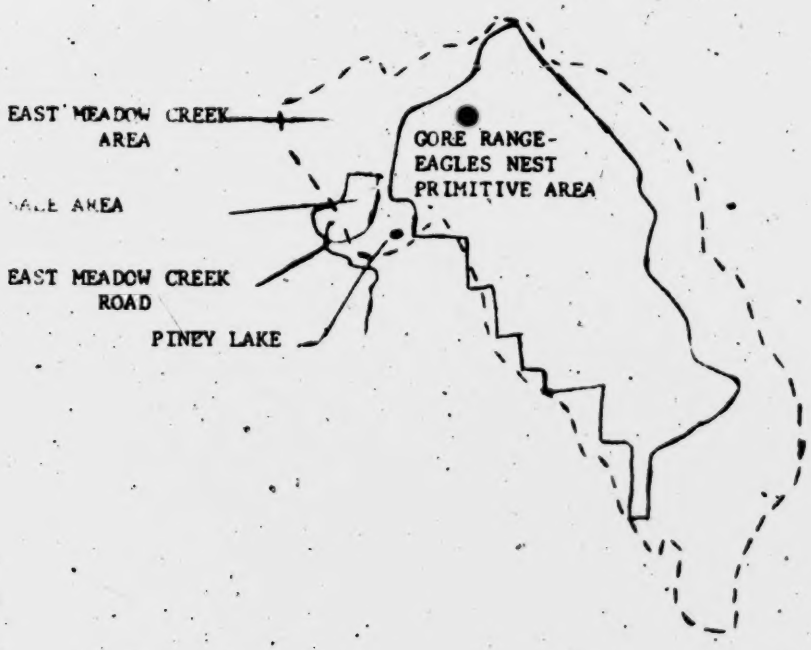
We conclude then that the cause is a proper one for equitable intervention. We determine that the preliminary injunction heretofore entered be continued indefinitely or until a determination has been made by the President and Congress that East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range-Eagles Nest or that it should not be.

Plaintiffs will submit an appropriate judgment for the Court's signature.

APPENDIX I

Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness (Gore Range-Eagles Nest Primitive Area) of Approximately 111,000 Acres.

October 4, 1967



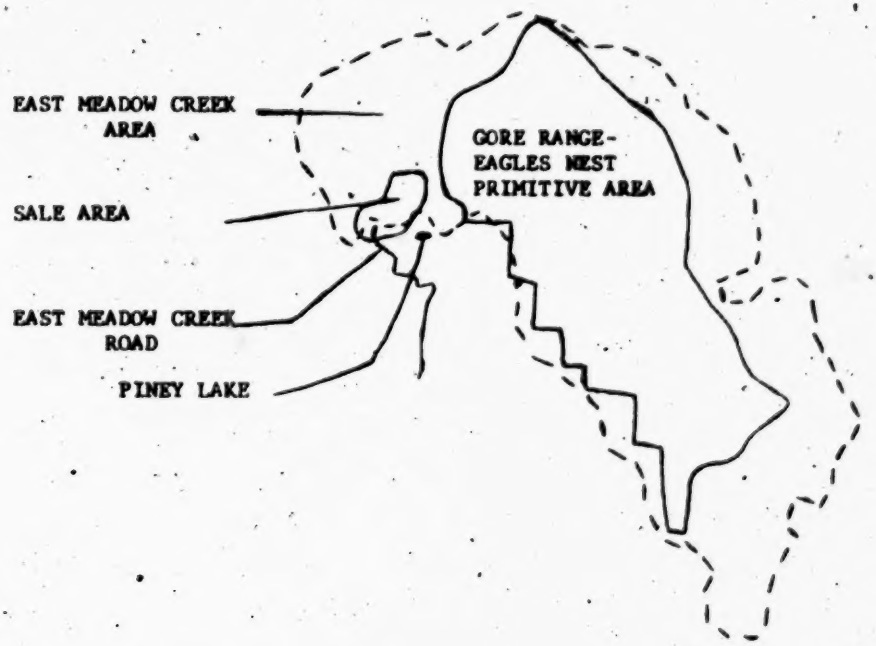
LEGEND

------ BOUNDARY PROPOSED BY CITIZENS' COMMITTEE, OCTOBER 4, 1967

APPENDIX II

Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness (Gore Range-Eagles Nest Primitive Area) of Approximately 117,000 Acres.

February 13, 1969



LEGEND

------ REVISED BOUNDARY PROPOSED BY CITIZENS' COMMITTEE

(A1237)

SEPTEMBER TERM—OCTOBER 1, 1971

NOS. 404-70, 405-70, 406-70

ROBERT W. PARKER, et al., *Appellees*

v.

UNITED STATES OF AMERICA; CLIFFORD HARDIN, individually and as Secretary of Agriculture of the United States; EDWARD P. CLIFF, individually and as Chief, United States Forest Service; DAVID S. NORDWALL, individually and as Regional Forester; JAMES O. FOLKESTAD, inividdually [sic] and as Supervisor, White River National Forest, United States Department of Agriculture; KAIBAB INDUSTRIES, an Arizona Corporation; and WESTERN WOOD PRODUCTS ASSOCIATION, Intervenor, *Appellants*

Before Honorable DAVID T. LEWIS, Chief Judge; and Honorable JOHN C. PICKETT and Honorable ARLIN M. ADAMS (of the Third Circuit), Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

A true copy.

Teste:

HOWARD K. PHILLIPS,
Clerk, U.S. Court of Appeals,
Tenth Circuit.

By

HEIDE BARTHEL,
Deputy Clerk.

In the United States District Court
for the District of Colorado

Civil Action No. C-1368

ROBERT W. PARKER, et al.,

Plaintiffs

v.

UNITED STATES OF AMERICA; CLIFFORD HARDIN, individually and as Secretary of Agriculture of the United States; EDWARD P. CLIFF, individually and as Chief, United States Forest Service; DAVID S. NORDWALL, individually and as Regional Forester; JAMES O. FOLKESTAD, individually and as Supervisor, White River National Forest, UNITED STATES DEPARTMENT OF AGRICULTURE and KAIBAB INDUSTRIES, an Arizona corporation,

Defendants

ORDER

The above titled and numbered cause having come before this Court for trial on January 26 through January 29, 1970, and all parties hereto having appeared by counsel, and the Court having heard the pleadings, the evidence, and arguments of counsel, and having written and filed a Memorandum Opinion and Order on December 24, 1969, and a Memorandum Opinion and Order on February 27, 1970, both of which are herein referred to for specific findings of fact and law, and upon due consideration thereof it appearing to the Court that the Plaintiffs should be granted the relief prayed for in their Complaint, it is therefore on this, the 18th day of March, 1970,

ORDERED, ADJUDGED AND DECREED:

1. That the preliminary injunction heretofore granted and issued by this Court herein on the 1st day of August, 1969, and entered in the office of the Clerk of this Court on the same day, be and the same hereby is continued indefinitely or until a determination has been made by the President and Congress that East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range—Eagles Nest or that it should not be, and that the Defendants, their officers, agents and employees, for such period of time, are enjoined from the cutting and grading of roads and the harvesting of timber within the Timber Sale Area in Eagle County, Colorado, as described in the Complaint herein; and

2. That the East Meadow Creek region be included in the wilderness study report of the Secretary of Agriculture to the President and Congress, as identified and set forth in said Memoranda herein referred to.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants pay the costs of these proceedings to be taxed by the Clerk of this Court, and that execution issue for the same.

Dated at Denver, Colorado, this 18th day of March, 1970.

BY THE COURT:

/s/ William E. Doyle

William E. Doyle, Judge

United States District Court

RT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
MAR 1 1972
E. ROBERT SEAVER, CLERK

Nos. 71-915 and 71-973

UNITED STATES, *et al.*,
Petitioners,

v.

ROBERT W. PARKER, *et al.*,

KAIBAB INDUSTRIES, *et al.*,
Petitioners,

v.

ROBERT W. PARKER, *et al.*,

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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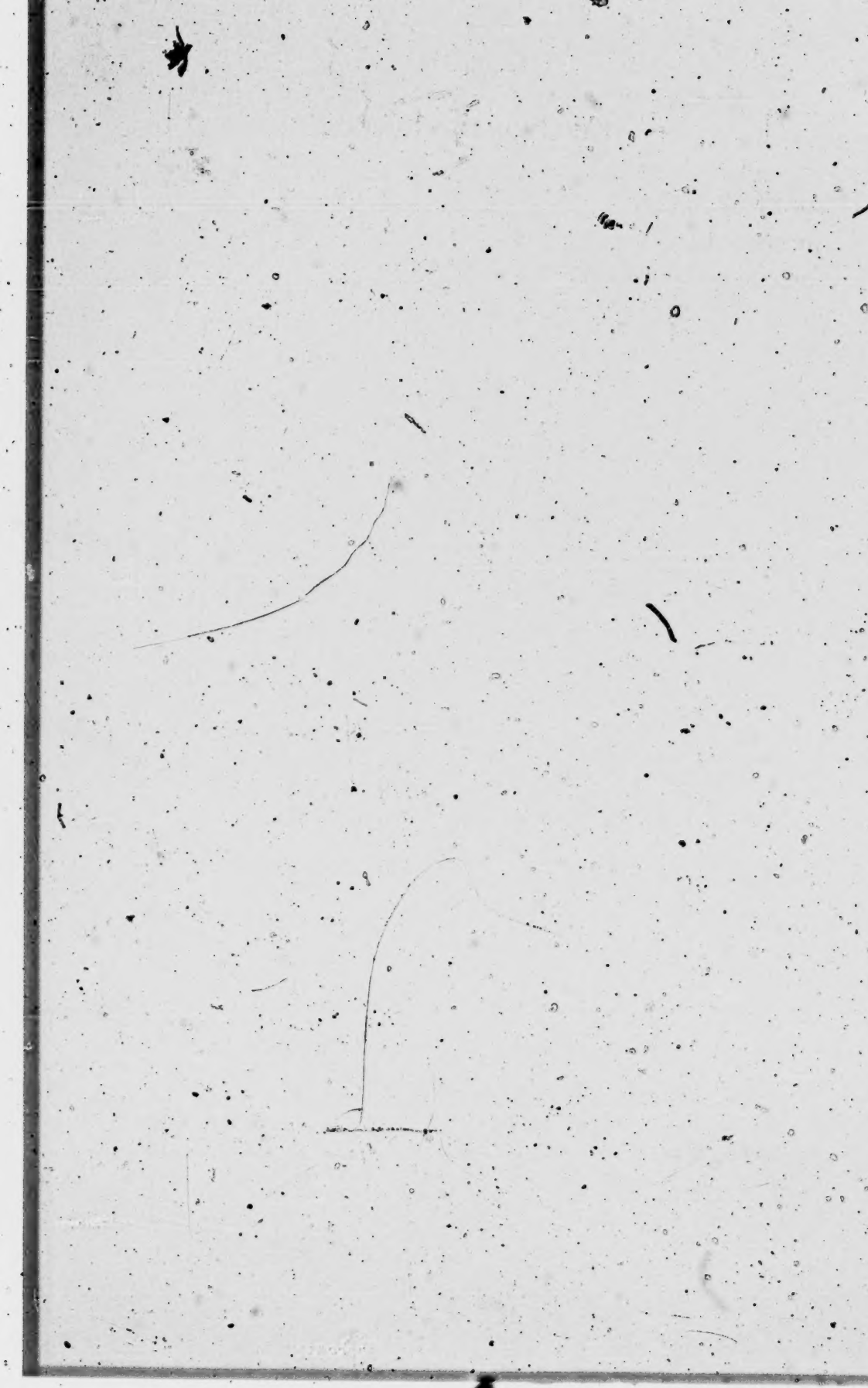


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-915 and 71-973

UNITED STATES, *et al.*,

Petitioners,

v.

ROBERT W. PARKER, *et al.*,

KAIBAB INDUSTRIES, *et al.*,

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v.

ROBERT W. PARKER, *et al.*,

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (U.S. Pet. App. C, pp. 15a-30a; Kaibab Pet. App. 31-48) is reported at 309 F. Supp. 593. The opinion of the court of appeals (U.S. Pet. App. A, pp. 1a-11a; Kaibab Pet. App. 21-30) is reported at 448 F.2d 793.

JURISDICTION

The judgment of the court of appeals (U.S. Pet. App. B, 13a; Kaibab Pet. App. 49) was entered on October 1, 1971. The time for filing the petitions for writs of certiorari having been extended, the petition of the federal petitioners was filed on January 13, 1972, and that of the private petitioners on January 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's finding that East Meadow Creek area is of wilderness value is supported by the evidence.

2. Whether the Secretary of Agriculture is required by the Wilderness Act to review whether national forest lands which are of wilderness value and which are contiguous to land designated as primitive should be preserved as wilderness and to report his findings to the President.

3. Whether the district court properly had discretion to issue an injunction prohibiting the Secretary of Agriculture from allowing intensive timber cutting within an area of wilderness value until he had made its own review as to whether the area should be preserved as wilderness and until the President and Congress had made their determinations.

STATUTES INVOLVED

The pertinent provisions of the Wilderness Act of September 3, 1964, 16 U.S.C. 1131-1136, and of the Multiple Use-Sustained Yield Act, 16 U.S.C. 528-531 appear in Appendix A to the petition of Kaibab Industries, pp. 1-20.

STATEMENT

Respondents brought this action on April 4, 1969, in the United States District Court for the District of Colorado to enjoin the United States and named federal officials (the federal petitioners) from selling 4.3 million board feet of timber on East Meadow Creek in White River National Forest, Colorado, to Kaibab Industries. This tract of 1200 acres is located, at its nearest point, within a mile of the Gore Range-Eagles Nest Primitive Area. Kaibab Industries was made a necessary party defendant on April 10, 1969.

Respondents alleged, *inter alia*, that federal petitioners had acted in violation of the Wilderness Act of 1964, 16 U.S.C. 1131, *et seq.*. More specifically, they alleged that the federal defendants had failed to make a study of East Meadow Creek to determine whether it should be preserved as wilderness under the Act; that the President and Congress should have an opportunity to consider the area for preservation; and that the sale of the timber would irrevocably destroy the wilderness character. The district court denied petitioners' motions to dismiss on July 31, 1969, and issued a preliminary injunction against any timber sale.

On December 24, 1969, the district court denied motions by petitioners for summary judgment, holding: (1) that it had jurisdiction over the parties and the subject matter; (2) that the action was not barred by sovereign immunity; and (3) that respondents should have an opportunity to present evidence as to the suitability of East Meadow Creek for wilderness within the definition of the Wilderness Act. 307 F. Supp. 685.

After a four-day trial, the district court found that the area has "significant wilderness resources" (U.S. App. 29a, 30a). It held that the federal defendants had violated the Act and the Forest Service's own regulations by failing to study the area for determination whether it should be preserved as wilderness (U.S. Pet. App. 24a-25a). It further held that since the cutting of timber in the area would

"frustrate the purpose of the Wilderness Act to vest the ultimate decision as to wilderness classification in the President and Congress, rather than the Forest Service and Secretary of Agriculture," the court should prohibit such cutting to protect the status quo (U.S. Pet. App. 30a). The district therefore ordered the federal defendants to make a wilderness study of the area and prohibited the sale or cutting of timber until a decision could be made by the President and Congres (Kaibab Pet. App. 51).

The Court of Appeals for the Tenth Circuit affirmed (U.S. Pet. App. 13a). It first upheld the findings of the district court of the "wilderness value" of the area (U.S. Pet. App. 6a). It then held that the Wilderness Act and regulations required the federal defendants to study the area and that, until this was done and the President and Congress had time to act, its wilderness character could not be destroyed. (U.S. Pet. App. 8a-9a).

ARGUMENT

This case involves whether a particular piece of national forest land should be considered for inclusion in the National Wilderness Preservation System. The courts below decided that East Meadow Creek should be studied by the Secretary of Agriculture so that the President and Congress could make their determination. They therefore ordered the Secretary not to permit timber cutting in the area, which would totally and irreparably destroy its wilderness character, until the determination could be made.

Respondents submit that the petitions for writs of certiorari should be denied. Petitioners do even assert that there is a conflict between the decision below and any other decisions of any court. The decision will not significantly affect the administration of the national forests except to require that the President and Congress have the opportunity to determine whether land of wilderness potential should be preserved in its natural state. And, finally, we submit that the unanimous decision of the court of

appeals, affirming the determination of the district court, is correct and should not be disturbed.

1. Petitioner Kaibab contends (Pet. 11-15) that the district court erred in finding that the East Meadow Creek area "seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value" and that the area "meets the minimum requirements of suitability for wilderness classification" (U.S. Pet. App. 20a, 30a).

The district court heard extensive evidence concerning the area. It found that it is "thickly wooded, secluded and unspoiled"; that "a wilderness experience can be obtained in this area"; that there are deer and elk in the summer and fall; that the area "is generally untrammeled by man" except for a short access road which is blocked off, cannot be used, and as a result of the dense forest, "is substantially unnoticable from approximately 100 yards away"; and that the preservation of East Meadow Creek would be desirable because it is "geographically contingous" and is "significantly interrelated with the Gore Primitive Area" (U.S. Pet. App. 18a, 19a, 29a). The court of appeals upheld the district court's findings as "supported by the record considered under any standard of appellate review" (U.S. Pet. App. 62).

Petitioner Kaibab claims (Kaibab Pet. 11-12) that the district court's finding is in conflict with that of the Forest Service which had studied the East Meadow Creek area and concluded that it should not be preserved as a wilderness area. However, as the district court noted (U.S. Pet. App. 20a), these studies were conducted solely under the Multi-Use-Sustained Yield act, 16 U.S.C. 528-531, which involves entirely different criteria. Moreover, the district court did not rule whether the East Meadow Creek should be preserved as wilderness but only "whether there is sufficient evidence of its wilderness character so as to require study and submission to the President and Congress for determination of its character * * *" (U.S. Pet. App. 20a-21a).

Even if the Service was correct in determining that the area should not be included in the wilderness system, it was at least required to submit these findings to the President. 16 U.S.C. 1132(b).

In short, the district court properly determined, based on the evidence before it and the standards prescribed in the Wilderness Act itself, whether East Meadow Creek should be considered for possible preservation as wilderness under the procedures provided in the Act. We submit that the findings of the district court are amply supported by the evidence. In any event, they plainly do not raise an issue appropriate for review by this Court.

2. Petitioners claim (U.S. Pet. 9-12; Kaibab Pet. 7-11) that the Wilderness Act and Forest Service Manual do not require the Secretary of Agriculture to review the East Meadow Creek as to whether it should be preserved as wilderness and to report his findings to the President.

Section 3(b) of the Wilderness Act, 16 U.S.C. 1132(b), specifically requires the Secretary to review areas of national forests classified as "primitive" for possible preservation as wilderness. The Secretary's findings as to primitive areas are submitted to the President who in turn advises the Congress of his recommendations. Section 3(b). An area is not included within the wilderness system unless Congress so designates it. Section 2(a), 16 U.S.C. 1131(a). Section 3(b) of the Act further provides that:

> Nothing herein contained shall limit the President in proposing as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value..

The courts below held that this provision, when read together with the rest of Section 3(b), requires the Secretary to review national forest land of wilderness value contiguous to primitive areas, as well as the primitive areas themselves, as to whether they should be preserved as wil-

derness. The procedures provided by the Act for determining whether national forest land should be included in the wilderness system consist of review by the Secretary, recommendation by the President, and decision by Congress. Since the Act must contemplate, as the district court said, "that the President shall be in a position to exercise a meaningful decision with respect to contiguous areas" (U.S. Pet. App. 24a), it necessarily requires the Secretary to review contiguous areas of possible wilderness value and submit his findings to the President.

The federal petitioners argue (Pet. 9-10) that "the legislative history of the [Wilderness] Act shows the intention of Congress was not to add new lands to those already removed from multiple-use management but rather that the Act's impact was to be solely upon lands already as removed." The government quotes several committee reports and statements of Congressmen that no land will be withdrawn under the Act from timber production, grazing, or mining except for lands already designated as "wilderness," "wild," "canoe" or "primitive" and therefore already withdrawn (Pet. 9-12). This legislative history, if it stated what the government claims, would be directly inconsistent with the sentence of Section 3(b) which specifically allows the President to include additional lands contiguous to primitive areas within the wilderness system. And it is of course well-established that the plain language of the statute, rather than its legislative history, must govern when the language of the act is clear. *E.g., United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929); *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 449 (1937).

However, the legislative history is in fact not inconsistent with the language of the statute. First, the statements quoted by the government say no more than that the Act does not withdraw more land for wilderness purposes. This is factually correct since the Act itself included in the wilderness system only land which had already been designated

as "wilderness," "wild," or "canoe." 16 U.S.C. 1132 (a). Lands contiguous to primitive areas and even primitive areas themselves could not be preserved as wilderness unless the Congress decided to do so by passing subsequent legislation. 16 U.S.C. 1131(a), 1132(b). Consequently, the decision of the courts below simply to require consideration of East Meadow Creek so that Congress can later determine whether to withdraw it from timber production, is not inconsistent with the statements relied on by petitioners.

Second, the Wilderness Act was introduced in 1956 and was debated and rewritten over a nine-year period ending with passage in its present form in 1964. The statements to which the federal petitioners attach such importance occurred in 1961 and 1963, largely in the Senate. The 1961 debate concerned a bill which, after stating that the President can recommend the inclusion in the wilderness system of contiguous areas, included the following provision (107 Cong. Rec. 18042 (1962)):

> Provided further, That following such exclusions and additions any primitive area recommended to be continued in the wilderness system shall not exceed the area classified as primitive on the date of this Act.

Until final passage of the Act in 1964, this proviso remained in all versions considered by the Senate. S. 4, S. Rep. No. 109, 88th Cong., 1st Sess.; 109 Cong. Rec. 5943 (1963).

In 1964, however, the House Committee reported H.R. 9070 which for the first time contained the pertinent language of Section 3(b) without the Senate proviso. 110 Cong. Rec. 17449 (1964); H. Rep. No. 1538, 88th Cong. 2nd Sess., 1964 U.S. Code Cong. & Admin. News 3615. H.R. 9070 was passed by the House on July 2, 1964, with only slight changes. (110 Cong. Rec. 17547 (1964)) and was then passed without debate in the Senate (110 Cong. Rec. 20601 (1964)). Federal petitioners cite no legislative history from the summer of 1964 when the bill was actually

adopted since that history does not contradict in any way the plain meaning of Section 3(b) as it now stands.

Respondents' view of Section 3(b) is further supported by the Forest Service Manual. Section 2321(1) of these regulations provide that:

> Each Primitive Area (so classified as of September 3, 1964) and contiguous lands which seem to have significant wilderness resources will be studied to determine whether to recommend that all or part should be included in the National Wilderness System.

This provision demonstrates that the Forest Service considers Section 3(b) as requiring it to study areas of wilderness value. Its only real dispute with respondents and the courts below is whether East Meadow Creek is the kind of area as to which a study should be made and findings submitted to the President.

Even if Section 3(b) did not require review of contiguous areas of wilderness value, the Forest Service Manual contains "directives" which the Service must follow, 36 C.F.R. 200.4. This Court has held that a similar manual of the Department of Housing and Urban Development is binding upon the agency. *Thorpe v. Housing Authority*, 393 U.S. 268, 274-278 (1969).

The decision below on this issue will not substantially burden the federal defendants. They are simply required to review all national forest lands which are both contiguous to primitive areas and of wilderness value for possible inclusion in the wilderness system and submit their findings to the President. The Forest Service Manual clearly requires this action and numerous such studies have actually been conducted by the Forest Service (U.S. Pet. App. 9a, 27a, note 5; C.A. App. 771-786).

3. Finally, petitioners contend (U.S. Pet. 8, 13-14; Kaibab Pet. 10-11, 15-16) that the injunction is too broad in that it interferes with the Secretary of Agriculture in administering the national forests. We do not doubt that

the Secretary has the authority to sell timber in national forests. 16 U.S.C. 475, 476, 528. However, as we have seen, the President and ultimately the Congress have the responsibility to determine whether areas within national forests which are contiguous to primitive areas and which are of wilderness value should be preserved as wilderness.

The courts below concluded that East Meadow Creek came within the procedures provided in the Wilderness Act. Having made this determination, they properly prohibited the Secretary of Agriculture from cutting large amounts of timber in the area before the President and Congress could make their decision. If the Secretary were allowed to proceed, he would, as the court of appeals held (U.S. Pet. App. 8a), "render meaningless the clear intent of Congress expressed in 16 U.S.C. § 1132(b) that both shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation."

It is true that Section 4(a)(1) of the Wilderness Act, 16 U.S.C. 1133(a)(1) provides that:

> (a) The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and—
>
> (1) Nothing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple Use-Sustained Yield Act of June 12, 1960 (74 Stat. 215).

The Multiple Use-Sustained Yield Act provides that "the establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of" the Act. 16 U.S.C. 529. Therefore, it is clear that prohibiting the Secretary under the Wilderness Act from cutting timber in wilderness areas within national forests

or, as the courts below held, from cutting timber in areas which must be considered as possible wilderness areas, is not inconsistent with the statutes giving the Secretary authority for administering national forests. Indeed, if Section 4(a)(1) of the Wilderness Act were construed to allow all purposes for which the national forests are generally administered, including timber cutting, to be carried out in wilderness areas of the forests, this Section would obviously make a nullity of the entire Act.

It is of course well established that the district courts have broad discretion as to the scope of injunctions. *E.g., Watson v. City of Memphis*, 373 U.S. 526, 538 (1963); *Winston Research Corp. v. Minnesota Mining & Mfg. Co.*, 350 F.2d 134, 143 (C.A. 9, 1965). The district court here found that "the interests of the plaintiffs and the public in maintaining the status quo until the requirements of the Act have been fulfilled far outweigh this desire" to cut timber immediately (U.S. Pet. App. 30a). The district court acted well within its discretion in determining that the Secretary of Agriculture could not be allowed to destroy the wilderness character of East Meadow Creek before a determination by the proper bodies whether to preserve it as wilderness could be made.

The federal petitioners claim (Pet. 14) that this decision, if applied generally, "would seriously disrupt the management for multiple use of millions of acres of forest lands." However, the 4.75 million acres of national forest lands which the federal petitioners suggest are of wilderness value can admittedly provide only 3 percent of the timber which can be cut annually under current Forest Service practices on national forest lands and only 25 percent of the timber which can be cut in Trinity National Forest, which apparently would be the national forest most seriously affected (Pet. 15). Moreover, many of these areas are not affected by the decision below because, as the court of appeals found (U.S. Pet. App. 9a), they have been recommended by the Secretary for preservation as wilderness.

None of the lands affected by their decision have previously been harvested for timber or used for any other purposes inconsistent with their wilderness character. A delay of a few more years until the President and the Congress have had the opportunity to consider whether these lands should be preserved as wilderness would not have any significant impact. During this period, the Forest Service could permit additional cutting and recreational use on other nearby national forest lands which were plainly not suitable for consideration as wilderness. Such nearby areas could not possibly be exhausted because the Multiple Use-Sustained Yield Act does not allow cutting of all or even 75 percent of any large area of national forest land within a few years' time. If it was determined not to preserve the area as wilderness, it could then be cut or used for other national forest purposes.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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